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ne 12, 1985

Title: Vincent T. Cerbone, Justice of the Village Court, Village of Mt. Kisco, New York, et al., Petitioners
v.
Lynn H. Conway

Court: United States Court of Appeals for the Second Circuit

Counsel for petitioner: Close, Michael F.

Counsel for respondent: Conway, Lynn H., Miller, George Russell

try	Date	Note	Proceedings and Orders
1	Jun 12 1985	G	Petition for writ of certiorari filed.
2	Jun 20 1985		Letter from petitioner in compliance with Rule 28.1 filed.
3	Jul 15 1985		Brief of respondent Lynn H. Conway in opposition filed.
4	Jul 17 1985		DISTRIBUTED. September 30, 1985
5	Sep 24 1985	X	Reply brief of petitioner Justice Cerbone, Village Ct. of Mt. Kisco filed.
6	Jan 22 1986		REDISTRIBUTED. January 24, 1986
7	Jan 27 1986		Petition GRANTED. limited to Questions 1, 2, 3, and 4 presented by the petition.
			**********
8	Feb 26 1986		Record filed.
9	Feb 26 1986		Certified copy of original record and proceedings received.
1	Mar 3 1986		Order extending time to file brief of petitioner on the merits until April 11, 1986.
2	Apr 11 1986		Brief amicus curiae of United States filed.
3	Apr 12 1986		Brief of petitioners Justice Cerbone, Village Ct., et al. filed.
4	Apr 12 1986		Joint appendix filed.
5	Apr 23 1986	D	Motion of petitioners for divided argument filed.
6	May 5 1986		Motion of petitioners for divided argument DENIED.
8	May 8 1986		Order extending time to file brief of respondent on the merits until June 16, 1986.
9	Jun 13 1986		Brief of respondent Lynn H. Conway filed.
0	Jun 13 1986		Brief amicus curiae of ACLU, et al. filed.
1	Jul 17 1986		CIRCULATED.
2	Sep 3 1986		SET FOR ARGUMENT. Monday, November 10, 1986. (3rd case) (1 hour)
3	Nov 1 1986	X	Reply brief of petitioner Justice Cerbone, Village Ct. filed.
4	Nov 5 1986		ARGUED.

PETITION FOR WRIT OF CERTIORARI

84-1947

No.

Office-Supreme Court, U.S.
FILED
JUN 12 1985
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

VINCENT T. CERBONE, as Justice of the Village Court, Village of Mt. Kisco, New York,

Petitioner,

and

BANO BUICK, INC., ALFRED MARTABANO, and ALFRED V. MARTABANO,

Co-Petitioners,

—against—

LYNN H. CONWAY,

Respondent.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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12 June 1985

QUESTIONS PRESENTED

1. In this §1983 action for malicious prosecution, which the district court dismissed on finding that "defendants did not deprive the plaintiff of any constitutionally protected right" (A39), did the Second Circuit err when it held that 42 U.S.C. §1988 incorporates as a §1983 claim New York's common law of malicious prosecution (A25–A27), without identifying any "right[ ], privilege[ ] or immunit[y] secured by the Constitution and laws", contrary to *Baker v. McCollan*, 443 U.S. 137 (1979), which rejected exactly this analysis in a false arrest case?

2. Did the Second Circuit err in holding that a malicious prosecution is of constitutional magnitude because it alleges " 'great humiliation, ridicule, and mental anguish' " (A4), and an arrest under warrant which the Court elsewhere held time-barred (A22), contrary to *Paul v. Davis*, 424 U.S. 693, 697 (1976), which rejected common law defamation as a §1983 claim?

3. Even assuming that the interest in freedom from unjustified litigation protected by common law malicious prosecution is either "liberty" or "property" under the Fourteenth Amendment, does the comp!aint state a claim under the Due Process Clause in light of *Parratt v. Taylor*, 451 U.S. 527 (1981), *Hudson v. Palmer*, *U.S.* , *104 S.Ct. 3194 (1984)*, and *Ingraham v. Wright*, 430 U.S. 651 (1977), since the acts complained of were random, unauthorized, and tortious under state law, which provides an adequate and parallel tort remedy?

4. When the Second Circuit below rejected the application of *Parrat v. Taylor*, 451 U.S. 527 (1981), *Hudson v. Palmer*, U.S. , 104 S.Ct. 3194 (1984), and *Ingraham v. Wright*, 430 U.S. 651 (1977), to a §1983 malicious prosecution due process complaint, did it misconstrue *Parratt*, *Hudson*, *Ingraham* and *Monroe v. Pape*, 365 U.S. 167 (1961), on which it relied?

5. Did the Second Circuit err in reversing on the basis of matters first filed under rule 60(b) in the district court long after the notice of appeal was filed (A11–A13), in contravention of Appellate Rule 10(a) and F.R.Civ.P. 60(b)(2) which confines "newly discovered evidence" to that "which by due diligence could not have been discovered in time to move for a new trial

under rule 59(b)", and when the district court has not ruled on the 60(b) motion?

[Cerbone only presents the following question]

6. Will this court resolve the conflict in the circuits as to whether the requirements of Appellate Rule 3(c) that the notice of appeal "shall designate the judgment, order or part thereof appealed from" is jurisdictional or advisory?

PARTIES BELOW

The parties to the proceeding below were: respondent/plaintiff Lynn H. Conway; petitioners/defendants, Justice Vincent T. Cerbone, Bano Buick, Inc., Alfred Martabano and Alfred V. Martabano; and the Village of Mount Kisco, New York and Detective Larry McKinsey, a police officer of defendant Village. The Court of Appeals affirmed the dismissal of the claims against the Village and Detective McKinsey, since that order is not sought to be reviewed here, they are not made parties to this petition.

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Co-Petitioners, VINCENT T. CERBONE, as Justice of the Village Court of the Village of Mt. Kisco, New York ("Cerbone"), BANO BUICK, INC., ALFRED MARTABANO and ALFRED V. MARTABANO ("Bano"), respectfully pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Second Circuit, entered on 11 December 1984 and 15 March 1985, and in support of their joint petition under Rule 19.4 set forth as follows:

Opinions Below

The opinions and orders of the United States Court of Appeals for the Second Circuit are reported officially at 758 F. 2d 46 (1985), and at 750 F. 2d 205 (1984). They are reprinted herein in the Appendix at A1–A7 and A8–A29.

The 15 March 1983 slip opinion of the United States District Court for the Southern District of New York, the Honorable Mary Johnson Lowe, dismissing the claims against the BANOS is not officially reported; it is reprinted in the Appendix at A30–A39; the 17 January 1983 endorsement order dismissing the complaint against Justice Vincent T. Cerbone is reprinted at A40–A41.

Jurisdiction

The order granting Cerbone's motion motion for summary dismissal on grounds of absolute judicial immunity was entered in the United States District Court for the Southern District of New York on 21 January 1983. The order granting the Banos' motion for summary judgment was entered in the United States District Court 25 March 1983.

On respondent's timely appeal filed 21 April 1983, the Second Circuit on 11 December 1984 entered a partial judgment and opinion reversing the 25 March 1983 order; it directed further proceedings as to petitioner Cerbone. After receiving briefs from Cerbone and respondent, it reaffirmed its 11 December rulings and reversed the 17 January 1983 order on 15 March 1985. No petition for rehearing was sought.

The jurisdiction of this Court to review the judgments of the Second Circuit is invoked under 28 U.S.C. §1254(1).

Statutes Involved

42 U.S.C. §1983 provides in pertinent part:

> *§1983. Civil action for deprivation of rights.* Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisidiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. * * *

(As amended Dec. 29, 1979, P.L. 96–170, §1, 93 Stat. 1284).

42 U.S.C. §1988 provides in pertinent part:

> *§1988. Proceedings in vindication of civil rights.*
>
> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. * * *

(As amended Oct. 21, 1980, P.L. 960481, Title II, §205(c), 94 Stat. 2330.)

The Fourteenth Amendment provides in part:

AMENDMENT 14

> *Section 1. Citizens of the United States.*
>
> * * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *

Federal Rule of Appellate Procedure 10(a) provides:

> *Rule 10. The Record on Appeal.*
>
> *(a) Composition of the Record on Appeal.* The original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court shall constitute the record on appeal in all cases.

Federal Rule of Appellate Procedure 3(c) provides:

> *Rule 3. Appeal as of Right — How Taken.*
>
> *(c) Content of the Notice of Appeal.* The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Form 1 in the appendix of Forms is a suggested form of a notice of appeal. An appeal shall not be dismissed for informality of form or title of the notice of appeal.

Federal Rule of Civil Procedure 60(b)(2) provides:

> *Rule 60. Relief from Judgment or Order*
>
> * * *
>
> *(b) Mistakes: Inadvertence; Excusable Negligence; Newly Discovered Evidence; Fraud, etc.*
>
> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or

> porceeding for the following reasons: * * *. (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); * * *

Statement of the Case

On 12 July 1982 plaintiff filed in the United States District Court for the Southern District of New York this action pleaded under 42 U.S.C. §§ 1983 and 1985(3) against "VINCENT T. CERBONE as Justice of the Village Court, Village of Mount Kisco" ("Cerbone"), BANO BUICK, INC., ALFRED MARTABANO and ALFRED V. MARTABANO ("Bano"), among others,[1] arising out of the Banos' filing of a criminal charge against Lynn H. Conway accusing her of issuing a bad check in violation of New York Penal law §190.05. The complaint (A43–A49) seeks $2,000,000 compensatory and punitive damages, and attorneys fees, and apparently invokes jurisdiction under 28 U.S.C. §1331. The dispute arises out of plaintiff's bringing her to the Banos' car dealership to have certain repair work done, after which she issued her check to BANO BUICK, INC. to pay for the repairs and took possession of the car. The check was deposited into the Bano's bank account, and returned due to insufficient funds. The Banos redeposited the check, which was returned a second time, due to a stop payment order. The defendents Bano then filed a criminal complaint against the plaintiff in the Village Court of Mt. Kisco, which subsequently led to her arrest upon warrant in June 1977 for issuing a bad check. Criminal charges against the plaintiff were ultimately dropped on 20 September 1979.

On 15 January 1980, Conway commenced an action in New York Supreme Court against the same defendants here, except Cerbone, for false arrest and malicious prosecution in connection with the charges against her. In the state court action the claims against the Village of Mt. Kisco and Detective McKinsey were dismissed on both procedural grounds for failure to service a

[1] Conway also sued the Village of Mt. Kisco and Detective McKinsey, the officer who had executed the arrest warrant. The district court dismissed as to them on the basis of a prior state court dismissal, and that dismissal was affirmed by the Second Circuit.

notice of claim and substantively on quasi-judical immunity, based on the issuance of the warrant. While the state court complaint was still pending,[2] this §1983 action sounding in malicious prosecution and false arrest was commenced in the United States District Court, adding Justice Cerbone as additional defendant and praying for a "stay" purportedly under 28 U.S.C. §2283 of her state court complaint (A49).

Cerbone moved for judgment on the pleadings under Rule 12(c), contending he was absolutely immune from a complaint whose substantive allegations were that "Vincent Cerbone as Village Justice permitted, encouraged and acquiesceded in allowing the malicious and groundless civil charges to continue" (¶16) (A46), that Justice Cerbone "refused to dismiss said charges" *(ibid.)*; that Justice Cerbone "refused ... to commence a jury trial" (¶17) (A46); and that he "presided over said criminal matter, notwithstanding that he had disqualified himself" (¶18) (A46).

In an opinion dated 17 January 1983 and entered 21 January 1983, the district court granted Cerbone's motion under rule 12(c), finding that the acts alleged against Cerbone were barred by judicial immunity (A40–A41).

The Banos moved for summary judgment on the grounds, inter alia, that there was probable cause for instituting the proceeding; as the district court noted (A37), they had several times tried to contact plaintiff about the check before instituting suit, and each time met with no response. Judge Lowe noted in the district court:

> Plaintiff has made no response to defendant's statement that repeated attempts were made to contact her by telephone. Her affidavit includes no facts which would demonstrate that she tried to resolve or explain the matter to defendants. She indicates only that "I will not at this point set

[2] The state court action against the Banos was ultimately dismissed on res judicata and collateral estoppel grounds as a result of the district court orders herein.

> forth all the facts and circumstances leading to this litigation." (Plaintiff's affidavit, p.6).
>
> * * *
>
> Accordingly, the Court finds that since plaintiff has not provided specific facts showing that defendants were unreasonable in instituting the criminal complaint against her (e.g., that she had responded to their attempts to contact her and had informed them that the check had been returned in error), summary judgment must be entered against her.

Appendix at A37.

As the Second Circuit noted (A11-A14), plaintiff did not in fact answer the above contention until a rule 60(b) motion was filed in September 1983, six months after final judgment had been entered against her. The circuit reversed the March order based upon the September filing (A11-A15).

The 1977 false arrest claim was dismissed by the district court as time-barred by a three-year statute of limitations for statutory actions. *Paul v. Board of Trustees*, 654 F.2d 856 (2d Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982)(A34). [3]

This order was affirmed by the Second Circuit (A22), but, curiously, Judge Oakes' opinion later apparently relies on the time-barred false arrest claim to sustain the validity of the complaint (A4), against Cerbone's brief below which argued the malicious prosecution was insufficient in light of *Baker v. McCollan*, 443 U.S. 137 (1979), *Paul v. Davis*, 424 U.S. 693 (1976), and *Gerstein v. Pugh*, 420 U.S. 103 1975 (A4).

Following entry of judgment, Conway's attorney filed a notice of appeal (A42) "from an order dated March 14, 1983 granting defendant Martabano's Motion to Dismiss Plaintiff's Complaint pursuant to rule 12(b) of Federal Rule of Civil Procedure (sic) and from each and every part of said order (A-42)." The clerk served this notice upon Cerbone's counsel pursuant to Appellate

[3] This holding is unaffected by the decision in *Wilson v. Garcia*, U.S. , 53 U.S.L.W. 4481 (17 April 1985), because New York's general personal injury statute is also three years. N.Y.C.P.L.R. §214(5).

Rule 3(d). Conway did not serve either of her two motions to reinstate her appeal on Cerbone (one made by counsel), nor her briefs on appeal (pro se). However, as the Second Circuit noted, Cerbone's attorney was served with Conway's district court motion filed 2 September 1983 to vacate the judgment served in response to Cerbone's motion for attorney's fees. Cerbone did not participate in the appeal. On 11 December 1984 the judgment was "tentatively" reversed as to Cerbone; after receiving a brief from Cerbone, on 15 March 1985 this reversal was affirmed in a published order.

REASONS FOR GRANTING THE WRIT

POINT I

THE HOLDING BELOW THAT COMMON LAW MALICIOUS PROSECUTION CONSTITUTES A §1983 CLAIM CONFLICTS WITH BAKER V. MCCOLLAN, 443 U.S. 137 1979, PAUL V. DAVIS, 424 U.S. 693 (1976), and GERSTEIN V. PUGH, 420 U.S. 103(1975)

The two courts below are in stark contrast as to the proper analysis to determine a cause of action under §1983. Judge Oakes simply incorporated the common law elements of malicious prosecution as a prima facie §1983 claim by virtue of §1988 (A25-A27), noting a colorable basis to claim that the prosecution was an attempt to collect on the check (A13). In contrast, the district court, although acknowledging a potential misuse of process claim, nonetheless dismissed this complaint because it "fails to state a cause of action under §1983 and §1985. Even if the interest of the individual defendants were to use the criminal process to collect the debt allegedly owed, where the process used was in accordance with the law of the State of New York, no federal cause of action is alleged" (A38).

The question is whether a common law claim for malicious prosecution implicates either "liberty" or "property" protected by the Due Process Clause. "The first inquiry in any §1983 suit . . . . is whether the plaintiff has been deprived of a 'right secured by the Constitution and laws.' " *Baker v. McCollan*, 443 U.S. 137, 140 (1979), or whether "[t]he interest in freedom

from unjustifiable litigation", Prosser, *Law of Torts*, §119 at 834 (4th Ed. 1971), is a "right[ ], privilege[ ] or immunit[y] secured by the Constitution and laws" within the meaning of §1983. *Paul v. Davis*, 424 U.S. 693 (1976)(common law defamation not §1983 violation), and *Baker v. McCollan*, 443 U.S. 137 (1979)(common law false imprisonment not actionable), all but foreclose the result against the plaintiff.[4] Since the interest protected by malicious prosecution "has much in common with that of reputation," Prosser, *supra*, the burden is certainly on the plaintiff to show why the common law tort of malicious prosecution is actionable. Not "every legally cognizable injury which may have been inflicted by a state official acting under 'color of law' establish[es] a violation of the Fourteenth Amendment," *Paul v. Davis*, 424 U.S. 693, 699 (1976). There is no generalized consitutional guarantee that a misdemeanor or any criminal complaint, as such, be founded upon probable cause. The controlling case is *Gerstein v. Pugh*, 420 U.S. 103, 119, 125 n.26 (1975), which held that the Constitution does not guarantee that the decision to prosecute be founded on probable cause. The mere lack of probable cause, which is the gravamen of malicious prosecution, *see* Prosser, *supra*, although tortious, is not a tort injury of constitutional magnitude. In the wake of *Gerstein*, *Baker* and *Paul* therefore, many lower federal courts have recognized that "a malicious prosecution [does not] offend the Constitution merely because the defendants are state officials." *Henry v. Minneapolis*, 512 F. Supp. 293, 296 (E.D. Wis. 1981); *Cook v. Houston Post*, 616 F.2d 791, 794-95 (5th Cir. 1980); *Cramer v. Crutchfield*, 648 F.2d 943, 945 (4th Cir. 1981); *Paskaly v. Seale*, 506 F.2d 1209, 1212 (9th Cir. 1974); *Wells v. Ward*, 470 F.2d 1185, 1187 (10th Cir. 1972); *United States ex rel. Rauch v. Deutsch*, 456 F.2d 1301 (3d Cir. 1972); *Puett v. Detroit*, 323 F.2d 591 (6th Cir. 1963), *cert. den.*, 376 U.S. 957 (1964); *Curry v. Ragan*, 257 F.2d 449, 450 (5th Cir. 1958), *cert. denied*, 358 U.S. 851 (1958)("Neither the Fourteenth Amendment nor the Civil Rights acts purport to

[4] We can assume that the arrest claim, notwithstanding the warrant, sufficiently invokes the Fourth Amendment "right to be secure in [her] person . . . against unreasonable . . . seizures", but since it is time-barred, the issue is moot.

secure a person against the unfounded or even malicious claims or suits in state courts . . ."); *Pollard v. Baskerville*, 481 F. Supp. 1157 (E.D. Va. 1979); *Riggs v. Miller*, 480 F. Supp. 769, 802–04 (E.D. Va. 1979), *aff'd*, 620 F.2d 294 (1980)("The fact that a federal correctional officer may have engaged in conduct constituting the common law torts of malicious prosecution and abuse of process should not automatically confer a right of action under the Fifth Amendment"); *Rosales v. Lewis*, 454 F.Supp. 956, 960 (S.D. Iowa. 1978); *Brainerd v. Potratz*, 421 F.Supp. 836, 840 (N.D. Ill. 1976)(neither defamation, malicious prosecution, nor negligent intentional infliction of emotional distress actionable); *Pyles v. Keane*, 418 F.Supp. 269, 276 (S.D.N.Y. 1976)("standing alone, a claim of malicious prosecution — although it might state conduct reprehensible in the extreme — is not enough to support a cause of action under Section 1983"); *see Croy v. Skinner*, 410 F.Supp. 117, 125 (N.D. Ga 1976)("an alleged conspiracy to 'cause' the swearing out of a false warrant simply does not state a claim cognizable under the Constitution and laws of the United States"); *Hahn v. Sargent*, 388 F.Supp. 445, 452 (D. Mass. 1975), *aff'd.* 523 F.2d 461, *cert. den.*, 425 U.S. 904 (1976).

By arguing that the interest in freedom from unjustifiable litigation is not *per se* of constitutional magnitude, petitioners/defendants do not mean to be understood as saying malicious prosecution is never actionable under §1983. For example, if plaintiff were maliciously prosecuted for exercising her First Amendment rights, she would have a §1983 claim. *Dellums v. Powell*, 566 F2d. 167, 194-96 (D.C. Cir. 1977)(war protesters on steps of United States Capitol). Similarly, a plaintiff prosecuted because of race or interracial associations would have a §1983 claim because of the Thirteenth Amendment and Fourteenth Amendment equal protection. *Nesmith v. Alford*, 318 F.2d 110, 116 (5th Cir. 1963), *cert. den.*, 375 U.S. 975 (1964).

Lynn Conway is not a member of any protected class; she was not prosecuted for engaging in any constitutionally protected activity, nor to prohibit her exercise of any constitutionally protected right. Whether or not there was probable cause for the bad check charge, she had no claim under §1983. *E.g.*, *Bretz v.*

Kelman, 722 F.2d 503,505 (9th Cir. 1983)(holding "facts alleging the common law tort of malicious prosecution alone are insufficient to state a deprivation of constitutional rights," but noting an exception for "malicious prosecutions conducted with the intent of denying a person equal protection or which otherwise subject a person to a denial of constitutional rights."). If this private grudge by private defendants over a bad check states a constitutional claim, then indeed the Ku Klux Klan Act has become the "font of tort law" which *Paul v. Davis*, 424 U.S. at 701, sought to avoid.

In view of the direct precedent of *Baker v. McCollan*, 443 U.S. 137 (1979), prominently argued below,[5] the Court should consider summary reversal.

POINT II

THE CIRCUITS ARE IN CONFLICT ON WHETHER MALICIOUS PROSECUTION IS ACTIONABLE AS SUCH UNDER §1983

The Circuits are divided over whether malicious prosecution if accomplished "under color of law" creates a §1983 claim: *San Filippo v. U.S. Trust*, 737 F.2d 246, 257 n.6 (2d Cir. 1984); *cert. denied*, U.S. , 105 S.Ct. 1408 (1985); *Wheeler v. Cosden Oil & Chemical Co.*, 734 F. 2d 254, 257-60, *modified*, 744 F.2d 1131 (5th Cir. 1984)(holding "an action lies under §1983 for malicious prosecution without probable cause in a state proceeding"; but noting "[o]ur sister circuits are divided on this issue"); *Dunn v. Tennessee*, 697 F.2d 121 (6th Cir. 1982), *cert. denied sub nom Wyllie v. Dunn*, 460 U.S. 1086 (1983); *Singleton v. City of New York*, 632 F.2d 185, 194-195 (2d Cir. 1980), *cert. denied*, 450 U.S. 920 (1981); *Jennings v. Shuman*, 567 F.2d 1213, 1220-21 (3d Cir. 1977); *Morrison v. Jones*, 551 F.2d 939, 940-41 (4th Cir. 1977), all hold that where the elements of the common law tort are satisfied a §1983 claim arises if the "color of law" element be satisfied. *Contra, Cameo Convalescent Center, Inc. v. Senn*, 738 F.2d 836, 845 (7th Cir.

[5] Cerbone devoted the first two pages of the eight-page letter brief the court allowed him (A29), to *Baker v. McCollan*, *Paul v. Davis* and *Gerstein v. Pugh*. Curiously, the Second Circuit chose not to address any of these cases.

1984), *cert. den. sub nom Percy v. Cameo Convalescent Center, Inc.*, U.S. , 105 S.Ct. 780 (1985)("the common law tort of misuse of legal procedure, without more, does not rise to the level of constitutional wrong"); *Bretz v. Kelman*, 722 F.2d 503, 505 (9th Cir. 1984); *Cloutier v. Epping*, 714 F.2d 1184, 1190 (1st Cir. 1983); *Cramer v. Crutchfield*, 648 F.2d 943, 945 (4th Cir. 1981)("the claims of malicious prosecution and abuse of process are only allegations of common law torts. As the district court held, these allegations were thus insufficient to state a valid cause of action under §1983"); *Cook v. Houston Post*, 616 F. 2d 791, 794-95 (5th Cir. 1980); *Cline v. Brusett*, 661 F.2d 108, 112, (9th Cir. 1981)("[t]he general rule is that malicious prosecution does not constitute a deprivation of life, liberty or property without due process of law and, therefore, is not cognizable under 42 U.S.C. §1983 (citation). However, an exception to this rule exists for malicious prosecution conducted with the intent of denying a person equal protection or which otherwise subjects a person to a denial of constitutional rights"); *Paskaly v. Seale*, 506 F.2d 1209, 1212 (9th Cir. 1974)("the tort of malicious prosecution, without more, does not constitute a civil rights violation"); *Martin v. King*, 417 F.2d 458, 460 (10th Cir. 1969), all hold that malicious prosecution is not *per se* actionable even if "color of law" be sufficiently pleaded. In view of the large number of §1983 malicious prosecution suits, *see Smith v. Gonzales*, 459 U.S. 829 (1982)(White, J., dissenting from denial of certiorari), and this Court's rulings that the closely related torts of false imprisonment and defamation are not *per se* actionable under §1983, this circuit conflict should be resolved, and the Court should consider summary reversal.

POINT III

THE SECOND CIRCUIT MISCONSTRUED *MONROE V. PAPE*, 365 U.S. 167 (1961), AS EXPLAINED IN *PARRATT V. TAYLOR*, 451 U.S. 527,536 (1981), WHEN IT RELIED ON *MONROE* TO SUSTAIN A §1983 DUE PROCESS CLAUSE COMPLAINT

Even if the interest in freedom from unjustifiable litigation is either "liberty" or "property" within the meaning of the Due

Process Clause, the existence of the state law law post-deprivation tort remedy of malicious prosecution provides plaintiff the process which is due because her §1983 claim is merely a replica of the time-barred[6] malicious prosecution claim. Since Mrs. Conway's constitutional claim rests, if at all, on the due process clause, she has no claim where the state provides an adequate and parallel tort remedy. Read together, *Hudson v. Palmer*, U.S. , 104 S.Ct. 3194 (1984), *Parratt v. Taylor*, 451 U.S. 527 (1981), and *Ingraham v. Wright*, 430 U.S. 651 (1977), compel the conclusion that those plaintiffs who rely solely on the due process clause as their foundation for the "right, privilege or immunity secured by the constitution or laws" under §1983 fail to state a claim where the conduct complained of is tortious under state law because "the existence of a state remedy may provide due process." *Coleman v. Faulkner*, 697 F.2d 1347, 1349 (10th Cir. 1982). The facts here fit well within the due process analysis of *Parratt* and *Hudson*. The common law tort here alleged does not violate the due process clause because "the impracticality of providing any meaningful pre-deprivation process can, when coupled with the availiability of some meaningful means by which to assess the propriety of the state's action at some time after the initial taking, satisfy the requirements of procedural due process." *Parratt v. Taylor*, 451 U.S. 527, 539 (footnote omitted). *See Bretz v. Kelman*, 722 F.2d 503 (9th Cir. 1983)(dismissing §1983 claim of malicious prosecution becuase plaintiff had adequate tort remedy, on the basis of *Parratt*). No matter how generously read, Mrs. Conway's complaint does not allege that it was a systematic or State-approved policy to enter into malicious conspiracies generally, which are tortious acts under state law. *Compare Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982)(state statutory scheme which deprived Logan of his property without opportunity for any hearing violates due process). Fairly viewed,

[6] Under New York law, Ms. Conway's claim for malicious prosecution must be brought within one year of dismissal of the charges. N.Y.C.P.L.R. §215(3). Under *Wilson v. Garcia*, U.S. , 53 U.S.L.W. 4481 (17 April 1985), the generalized three year period for personal injury, N.Y.C.P.L.R. §214(5), applies to §1983. Therefore, she must establish a federal cause of action to avoid the statute of limitations.

Mrs. Conway alleges only that she was the object of an *ad hoc* conspiracy between State and private figures[7] to get her to honor a bad check. This is precisely the *Parratt* Court's description of an injury where "the State cannot predict precisely when the loss will occur." 451 U.S. at 541.

Since *Hudson v. Palmer*, __U.S.__, 104 S.Ct. 3194 (1984) has extended *Parratt* to intentional acts, the only question is whether *Parratt* applies to "liberty" as opposed to "property" interests.[8] Both the Court's citation to *Ingraham v. Wright* and the earlier holding in *Lynch v. Household Finance*, 405 U.S. 538 (1972), strongly suggest it does. Not only does *Lynch* dispute the idea that the Constitution protects "liberty" more than "property", 405 U.S. 550–552, but "[t]he logic of *Parratt* permits no principled distinction between deprivations of property and liberty interests. If a deprivation results from a 'random and unauthorized' act by a state official, the State is no more able to predict the deprivation, and a pre-deprivation hearing is no more possible, when the deprivation involves a liberty interest than when it involves a property interest. Therefore, if plaintiff has an adequate post-deprivation remedy in state court, that should satisfy the requirements of due process and plaintiff should not be permitted to bring a §1983 claim in federal court." *Juncker v. Tinney*, 549 F. Supp. 574, 576 (E.D. Md. 1982). Mrs. Conway therefore was deprived of neither liberty nor property without due process of law. Her alleged malicious prosecution, if it occurred, was "random and unauthorized." It was not a state

[7] Although Cerbone assumes the facts as stated in the Second Circuit for purposes of this petition, he does not concedes their accuracy. He did not respond to the merits of Conway's September 1983 motion; rather, he pointed out to the district court that the evidence was grossly untimely under rule 60(b)(2). This objection in the district court was made moot by Judge Oakes' consideration of Conway's September 1983 attorneys' fee opposition and cross motion (A15; A11-A13) as part of the record on appeal from the March 1983 ruling.

[8] Several courts have directly held that it does. *Rutledge v. Arizona Board of Regents*, 660 F. 2d 1345 (9th Cir. 1981), *aff'd on other grounds sub nom Kush v. Rutledge*, __U.S.__, 103 S. Ct. 1483 (1983); *Gilmere v. Atlanta*, 737 F. 2d 894 (11th Cir. 1984), *reheard en banc* (January 1985) (wrongful death action sounding in assault and battery); *Thibodeaux v. Bordelon*, 740 F. 2d 329 (5th Cir. 1984); *contra, Wilson v. Beebe*, 743 F. 2d 342 (6th Cir. 1984).

sanctioned "procedure." *Cf. Monell v. Department of Social Services*, 436 U.S. 658 (1978) (unconstitutional policy regarding pregnancy leaves). Because New York provides adequate common law remedies for malicious prosecution, plaintiff presents no §1983 claim, *Barnier v. Szentmiklosi*, 565 F. Supp. 869 (E.D. Mich. 1983), *Dandridge v. Richmond*, 566 F. Supp. 152 (E.D. Va. 1983), since "traditional principles of tort law provide a completely adequate remedy for legitimate claims of malicious prosecution." *Willis v. Cool*, 546 F. Supp. 458, 463 (W.D. Mo. 1982), *aff'd*, 714 F. 2d 67 (1983) (relying on *Parratt*).

The Second Circuit rejected this argument, holding it was inconsistent with *Monroe v. Pape*, 365 U.S. 167 (1961) (A5). Because *Monroe*'s complaint clearly rested upon the "right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures" guaranteed by the Fourth Amendment, petitioners' due process argument did not apply to *Monroe*. Other circuits have expressly recognized that the *Parratt* analysis applies only to due process clause plaintiffs and not where a specifically guaranteed constitutional right is at stake: *E.g., Augustine v. Doe*, 740 F.2d 322 (5th Cir. 1984) (*Parratt* does not apply to warrantless breaking into a home). Indeed, this Court's opinion in *Parratt* expressly distinguished *Monroe* on this basis:

> "[The plaintiff's] claims differ from the claims which were before us in *Monroe v. Pape, supra*, which involved violations of the Fourth Amendment, and the claims presented in *Estelle v. Gamble*, 429 U.S. 97 (1976), which involved alleged violations of the Eighth Amendment. Both of these Amendments have been held applicable to the States by virtue of the adoption of the Fourteenth Amendment. [The plaintiff] here refers to no other right, privilege or immunity secured by the Constitution or federal laws other than the Due Process Clause of the Fourteenth Amendment *simpliciter*."

451 U.S. at 536 (citations omitted).

On this same basis this Court had distinguished *Monroe* in *Paul v. Davis*, 474 U.S. at 700–701. Despite this Court's clear precedents, the Second circuit misconstrued *Monroe v. Pape*, *Hudson v. Palmer*, and *Parratt v. Taylor*, and, as demonstrated below, its decision on these points is in conflict with other courts of appeals.

POINT IV

THE APPLICATION OF HUDSON V. PALMER, __U.S.__, 104 S.CT. 3194 (1984), PARRATT V. TAYLOR, 451 U.S 527 (1981), and INGRAHAM V. WRIGHT, 430 U.S. 651 (1977), TO §1983 DUE PROCESS CLAIMS IMPLICATING LIBERTY INTERESTS RAISES AN IMPORTANT QUESTION ON WHICH THE COURTS OF APPEALS ARE DIVIDED

"The courts that have attempted to implement the *Parratt* decision have thus far been unable to reach a consensus on the full meaning and reach of the decision." *Daniels v. Twin Oaks Nursing Home*, 692 F. 2d 1321, 1330 N.3 (11th Cir. 1982) (Hoffman, D.J., concurring) (citations omitted). Specifically, "the courts of appeals are divided on whether *Parratt v. Taylor* applies to deprivation of a liberty interest." *Wilson v. Beebe*, 743 F. 2d 342, 349-50 (6th Cir. 1984). In contrast to Judge Oakes' ruling below, which restricts *Parratt* essentially to property cases, the 5th, 7th, 8th, 9th and 11th circuits have applied the *Parratt* analysis to claims involving life and liberty. *See Gilmere v. Atlanta*, 737 F. 2d 894 (11th Cir. 1984), *reheard en banc* (January 1985) (assault, battery and wrongful death claim against police officer fails to state a §1983 claim); *Collins v. King*, 743 F. 2d 248 (5th Cir. 1984) (prisoner disciplined after allegedly biased hearing); *Thibodeaux v. Bordelon*, 740 F. 2d 329, 339 (5th Cir. 1984) (holding broadly that "*Parratt* applies to deprivations of liberty"; prisoner negligently burned has no §1983 claim); *Mills v. Smith*, 656 F. 2d 337 (8th Cir. 1981) (prisoner negligently shot while attempting to escape); *Rutledge v. Arizona Board of Regents*, 660 F. 2d 345 (9th Cir. 1981), *aff'd on other grounds sub nom. Kush v. Rutledge*, __U.S.__, 103 S.CT. 1483 (1983) (assault and battery by coach against football

player); *Wolf-Lillie v. Sonquist*, 699 F. 2d 864 (7th Cir. 1983) (execution of an invalid warrant of eviction).[9]

Judge Oakes' narrow reading of *Parratt* as confined to property interest is squarely supported by the Sixth Circuit. *Wilson v. Beebe*, 743 F. 2d 342, 350 (6th Cir. 1984) ("The better approach is to decline to apply *Parratt* to deprivations of a life or liberty interest. *Parratt* applies only to Section 1983 suits alleging the deprovation of a property interest. . ."); it is arguably supported by the Third Circuit's analysis in *Davidson v. O'Lone*, 752 F. 2d 817 (3d Cir. 1984) (*Parratt* would not apply to infringement of a liberty interest by intentional or grossly negligent conduct, or reckless indifference; prisoner's suit alleging negligent failure to prevent assault by another prisoner, however, dismissed).

Because "[a]pplication of the *Parratt* decision by the federal district and circuit courts has hardly been a model example of uniform judicial decisionmaking", *Thibodeaux v. Bordelon*, 740 F. 2d 329, 335(5th Cir. 1984), this Court should grant review. *See Jackson v. Joliet*, __U.S.__, 104 S.Ct. 1325 (1984) (White & Rehnquist, JJ., dissenting from denial of certiorari).

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[9] Some district courts have broadly applied *Parratt* to liberty cases. *See Hanson v. Larkin*, #3-83-Civ. 1340 (D. Minn.; slip opinion 27 March 1985) (extending *Parratt* to intentional acts involving liberty); *Cerva v. Fulmer*, 596 F. Supp. 86 (E.D. Pa. 1984) (dismissing claim of excessive force in effecting arrest under *Hudson v. Palmer*) (good review of law); *Dobson v. Green*, 596 F. Supp. 122 (E.D. Pa. 1984) (assault by police officers); *Hicks v. Feeney*, 596 F. Supp. 1504 (D. Del 1981) (involuntary commitment to hospital); *Delahoussaye v. Seale*, #83-0730 (W.D. La. 10 August 1984) (suspension of license and business defamation); *Graves v. Wayne County*, 577 F. Supp. 1008 (E.D. Mich. 1984); *Barnier v. Szentmiklosi*, 565 F. Supp. 869 (E.D. Mich. 1983) (dismissing unlawful arrest and assault and battery claims under *Parratt*). *See also Madden v. Meridien*, #84-41 (D. Conn. 8 Feb. 1985) (noting the split in the circuits and lower courts); *Eaton v. Solon*, 598 F. Supp. 1505 (N.D. Ohio 1984) (questioning the variety of inconsistent approaches), *but see Madden v. Meridien, supra*, ("substantive due process" is a limitation on *Parratt*); *Garcia v. County of Los Angeles*, 588 F. Supp. 700 (C.D. Cal. 1984) (same).

POINT V

THE SECOND CIRCUIT VIOLATED F. R. APP. P. 10(a) AND F.R. CIV. P. 60(b) (2) WHEN IT REVERSED THE JANUARY AND MARCH 1983 ORDERS BASED UPON EVIDENCE NEWLY SUBMITTED TO THE DISTRICT COURT IN A SEPTEMBER 1983 MOTION FILED BY PLAINTIFF UNDER RULE 60(b) LONG AFTER THE TIME TO APPEAL HAD EXPIRED AND WHEN THE DISTRICT COURT HAD NOT YET RULED ON THE 60(b) MOTION

Rule 10(a) of the Federal Rules of Appellate Procedure provides that:

> "The original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court shall constitute the record on appeal in all cases."

The Second Circuit based its decision on an extensive amount of information not presented to the District Court. The 11 December 1984 opinion specifically acknowledges reliance upon affidavits submitted long after the District Court's decision (A11–A13). At A11 n.2, the Second Circuit expressly refers to and relies on facts raised on respondent's post-appeal motion for relief from the District Court's judgment. Transcripts of examinations before trial (EBT) conducted in the State Court proceedings were appended to that motion, but never submitted earlier. The Circuit Court acknowledged that it relied on those transcripts in reaching its decision, despite the fact that they were not made available to the District Court, except for a few pages not relevant to this discussion.[10] Such procedure clearly runs contrary prior precedent even within the Second Circuit. *Dictagraph Products Co. v. Sonotone Corp.*, 231 F. 2d 867 (2d

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[10] The Circuit Court opinion of 11 December 1984 notes that the respondent's affidavit in the District Court was deficient. Nevertheless, the Circuit Court allowed the deficiencies to be cured by the EBT's filed after the District Court's dismissal (A13).

Cir. 1956) (on appeal from summary judgment, the Court of Appeals could not consider any depositions or any other evidence not filed in the District Court when the District Judge decided the motion). None of this late filing could possibly pass muster under rule 60(b) (2), since as the circuit court noted, it was material available to the plaintiff from her prior state court action.

The 11 December 1984 opinion concedes that plaintiff never presented any evidence to the District Court to the effect that she explained the problem with her check to co-petitioners BANO (A12).[11] Such argument was raised only in respondent's brief on the appeal, and the Court referred to the respondent's EBT, not submitted originally to the district court, to see if her brief and prior testimony were factually consistent (A12, n. 5). Thus the Court permitted respondent's brief and deposition filed in September 1983 to fill a void in her presentation to the District Court when represented by counsel in the District Court. Only in the Court of Appeals did she first appear *pro se*. The presentation to the district court must be deemed to have been a calculated strategy by counsel. Having elected to keep her cards close to the vest, the plaintiff cannot re-play her hand when the strategy fails. An appeal is restricted to the facts presented in the record and may not consider facts which could have been presented to the district court, but were not. *Hill v. Trustees of Indiana University*, 537 F. 2d 248, 251 n. 2 (7th Cir. 1976). Plainly the depositions (EBTs) first submitted on the rule 60(b) motion in September 1983 were barred by rules 60(b)(2)'s restriction to "newly discovered evidence which by due diligence could not have been presented in time to move for a new trial under rule 59(b)."

Plainly the court "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Rule 17.1(a).

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[11] Also see the District Court opinion of March 1983 (A37), which noted that respondent never reported allegations that she never attempted to resolve the problem.

POINT VI

THE COURTS OF APPEALS ARE DIVIDED ON WHETHER THE REQUIREMENT OF F.R.APP.P. 3(c) THAT THE NOTICE "DESIGNATE THE JUDGMENT, ORDER OR PART THEREOF APPEALED FROM" IS JURISDICTIONAL OR ADVISORY.

In this case Judge Oakes in effect held that because the notice of appeal was timely filed as to Justice Cerbone, a point he conceded below, that the requirements of Appellate Rule 3(c) that the notice (A42) (which was drafted by Conway's attorney) "state the order, judgment, or part thereof appealed from"[12] were merely advisory. Judge Oakes buttressed this conclusion by noting that in September 1983 the plaintiff (then pro se) had moved below under Rule 60(b) to vacate the 17 January and 15 March 1983 orders, and that the September 1983 Rule 60(b) motion was adequate notice to Cerbone that Conway "was taking steps to preserve the vitality of her claims against him" (A21), ignoring that (i) the district court motion was *not* notice of prosecution of an appeal, and (ii) it came long after the time to appeal had run. Although this ruling was in some agreement with a ruling by the Ninth Circuit,[13] it conflicts with prior rulings by the Second, Third, Fifth, Sixth, Seventh and Eleventh Circuits, which have dismissed portions of appeals for lack of jurisdiction under Appellate Rule 3(c), even though the notice was otherwise timely filed. *Pitney Bowes, Inc. v. Mestre*, 701 F.

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[12] Cerbone only raises this issue as it does not affect the Banos.

[13] In *United States v. One 1977 Mercedes Benz*, 708 F. 2d 444, 451 (9th Cir. 1983), *cert. denied*, __U.S.__, 104 S. Ct. 1981 (1984), the claimant impleaded third-party defendants, who were dismissed. In a later order, the vehicle was forfeited. The notice of appeal did not refer to the third-party defendants or the order dismissing them, and they first learned of the appeal when served with briefs. The Ninth Circuit granted leave to amend the notice. The ground was that no prejudice was shown because of a full opportunity to brief the appeal. 708 F. 2d at 451. In *One 1977 Mercedes Benz* at least the putative appellees were served by the appellant with its brief and could participate in the appeal before decision (on which they prevailed). In this case, Ms. Conway did not serve her appellant's briefs on Cerbone's attorneys, and the first notice to Cerbone that he was joined to the appeal was the 11 December 1984 order reversing as to him, which co-counsel, not the clerk, sent to him.

2d 1365, 1373–75 (11th Cir. 1983), *cert. denied*, __U.S.__, 104 S.Ct. 239 (1984) (where notice of appeal referred only to order granting motion for summary judgment, part of same order which refused to vacate injunction not within the court's jurisdiction); *Terkildsen v. Waters*, 481 F. 2d 201, 206 (2d Cir. 1973) (designation of specific order appealed from would be construed to deny review of other parts not specified; proceedings first complained about on brief on appeal could not be reviewed); *C.A. May Marine Supply Co. v. Brunswick Corp.*, 649 F. 2d 1049, 1055–56 (5th Cir.), *cert. den.*, 454 U.S. 1125 (1981) (appeal from single order which denied motion for new trial and granted motion to strike bill of costs which mentioned only denial of motion for new trial, did not allow review over bill of costs); *United States v. Martino*, 648 F. 2d 367, *vac. in part on other grounds, United States v Holt*, 650 F. 2d 651, (5th Cir. 1981), *cert. den. sub nom Lazzara v. United States*, 456 U.S. 943 (1982) (notice of appeal of conviction could not support review of separate order of forfeiture); *Hampton v. Hanrahan*, 600 F. 2d 600, 642–43 (7th Cir. 1979), *reversed on other grounds*, 446 U.S. 754 (1980) (where separate order granted defendants directed verdict on civil rights claims and later order dismissed common law claims, notice of appeal that referred only to the directed verdict orders could not apply to order dismissing common law claims); *Drayton v. Jiffee Chemical Corp.*, 591 F. 2d 352, 361 n.10 (6th Cir. 1978) (notice of appeal which specified only denial of punitive damages and denial of item of damages to the injured daughter could not allow review of order reducing amount recovered by mother for loss of society); *Elfman Motors, Inc. v. Chrysler Corp.*, 567 F. 2d 1252, 1254 (3rd Cir. 1977) (notice of appeal from final judgment must be dismissed against two defendants who earlier won dismissal on summary judgment since notice of appeal did nothing to designate the portion of judgment dismissing those defendants). None of the authority cited below (A19–A20) supports the holding. *United States v. Ward*, 696 F. 2d 1315 (11th Cir.), *cert. denied*, __U.S.__, 103 S.Ct. 2101 (1983) dealt with whether a letter from a prisoner could be considered a notice of appeal, not whether an attorney's designation of a specific order would be construed to include any other order not designated; *Cobb v.*

Lewis, 488 F. 2d 41 (5th Cir. 1974), dealt with a petition for leave to appeal under 28 U.S.C. §1292(b) as a substitute for a notice of appeal under rule 3.

The court below held that while Conway's briefs on appeal (and her two motions to restore her appeal, one served by counsel, and her pre-argument statement, served by counsel) were not served by her on Cerbone, the defect was waived because Cerbone did not object under Appellate Rule 25(b) (A3). This begs the question whether Cerbone was ever put on notice that he was an appellee and thus motivated to object. The Second Circuit's caption does not, and never has, listed Cerbone as an appellee.

Not only is Judge Oakes' ruling at odds with the plain language of 3(c) and the other cases quoted above, but it ignores vital interests in finality, repose and in the orderly functioning of the appellate process. In this case, Conway's appeal was twice dismissed for failure to prosecute; Cerbone never opposed the motions to reinstate, which were not served on him; Cerbone's attorney did not attend the preargument conference before staff counsel at which the case might have been settled, because plaintiff's attorney did not serve on him her pre-argument statement. It is unfair for the court to "tentatively" reverse a judgment with a published opinion and then grant a party what amounts to an opportunity to file a petition for rehearing. Effective advocacy on the appeal requires participation before judgment is rendered, not leave to reargue. The opinion itself acknowledges that it was "not unreasonable" (A21) for Cerbone to conclude he was not joined as party to the appeal. Rule 3(c) requires less ambiguous notice than that to take an effective appeal.

CONCLUSION

A writ of certiorari should be granted to review the judgment of the United States Court of Appeals for the Second Circuit. The Court should consider summary reversal.

New York, New York
12 June 1985

Respectfully submitted,
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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 91 — August Term, 1984

(Argued: October 18, 1984 Decided: March 15, 1985)

Docket No. 83-7318

LYNN H. CONWAY,

Appellant,

v.

THE VILLAGE OF MOUNT KISCO, NEW YORK; VINCENT CERBONE as Justice of the Village Court, Village of Mount Kisco, New York; DETECTIVE LARRY MCKINSEY, Officer of the Village of Mount Kisco Police Department,

Defendants,

—and—

BANO BUICK, INC.; ALFRED MARTABANO, individually and as an officer of BANO BUICK, INC.; and ALFRED V. MARTABANO, individually and as an officer of BANO BUICK, INC.,

Appellees.

Before:

OAKES and WINTER, *Circuit Judges*, and CLARIE, *District Judge.**

* Of the District of Connecticut, sitting by designation.

Complaint under 42 U.S.C. §§ 1983 and 1985 dismissed by United States District Court for the Southern District of New York, Mary Johnson Lowe, *Judge*, for failure to state a claim and on other bases. On appeal by pro se appellant, judgment was reversed and remanded in part, affirmed in part, with judgment suspended as to appellee Cerbone pending said appellee's leave to file brief in opposition to suspended judgment, *Conway* v. *Village of Mount Kisco*, 750 F.2d 205 (2d Cir. 1984).

On review of appellee's brief, judgment reaffirmed.

Lynn H. Conway, *Appellant Pro Se.*

Michael F. Close, Barry, McTiernan & Moore, New York, NY, *for Appellee Vincent Cerbone.*

OAKES, *Circuit Judge*:

In *Conway* v. *Village of Mount Kisco*, 750 F.2d 205 (2d Cir. 1984), familiarity with which is assumed, we suspended judgment against Vincent Cerbone and gave him permission to file a brief within thirty days from the date of entry of the judgment. He has filed a brief accordingly. We reaffirm our previous judgment and remand the cause with him as a codefendant.

Cerbone advances four claims—(1) that Conway waived her claims against Cerbone on appeal; (2) that Conway's complaint is legally insufficient as it relates to Cerbone as an individual; (3) that this court should defer ruling on the statute of limitations issue to await

a Supreme Court decision, and (4) that Cerbone in his individual capacity did not act under color of law.

1. Cerbone claims that Conway waived her contention that Cerbone is a party to this appeal, marshalling support—by reference to a number of documents—for the view that Conway did not intend Cerbone to be an appellee. The claim is generally misplaced; this court has already determined that Conway has shown an intent, sufficient to permit review, to appeal from the order dismissing her claims against Cerbone. For Cerbone to prevail on a waiver argument, he must therefore demonstrate that he suffers prejudice notwithstanding his current opportunity to state the case in support of the decision below. *See Sanabria* v. *United States*, 437 U.S. 54, 67 n.21 (1978); *Wheatley* v. *Beetar*, 637 F.2d 863, 864 n.1 (2d Cir. 1980). But this he does not do.

Moreover, his claim is unacceptable even on its own terms. Cerbone argues that the notice of appeal expressly mentions only the Martabanos' Rule 12(b) motion, while Cerbone's motion was made pursuant to Rule 12(c). The district court states, moreover, in its order of March 14, 1983, that the 12(b) *and* 12(c) motions are to be treated as motions for summary judgment. Cerbone is probably correct in assuming that Judge Lowe was not referring to *Cerbone*'s 12(c) motion, but the technical distinction he tries to draw does not help him.

Although Cerbone does not deny having been served with Conway's notice of appeal, he claims that Conway failed to serve him with several documents subsequent to the notice of appeal. We suggest that Cerbone waives his waiver claim by having failed to notify this court that Conway neglected to serve those documents in violation of Fed. R. App. P. 25(b). Similarly, Cerbone's argu-

ment that this court inappropriately refers to a document filed by Conway after the date of the notice of appeal ignores the fact that the document (Conway's affidavit in opposition to Cerbone's motion for attorney's fees) is described and attacked in a reply affidavit filed by Mount Kisco and Detective McKinsey on September 13, 1983, which was served on Cerbone and is identified as Item 30 on the docket sheet and certified by the district court as part of the record on appeal. Moreover, Cerbone could have moved under Fed. R. App. P. 10(e) to correct a misstated record, but did not do so.

2. Cerbone argues that Conway's claim in the nature of malicious prosecution is insufficient as a cause of action under § 1983. He seems aware that *Singleton* v. *New York*, 632 F.2d 185 (2d Cir. 1980), *cert. denied*, 450 U.S. 920 (1981), defeats the argument that a claim in the nature of malicious prosecution is per se insufficient under § 1983; his argument is instead that the deprivation Conway alleges lacks constitutional magnitude. Cerbone Brief at 2. The point is weak. Conway's complaint alleges that seven hours of detention and "great humiliation, ridicule, and mental anguish" resulted from Cerbone's conspiracy with the Village, Bano Buick, and the Martabanos to execute the arrest warrant. Complaint at ¶¶ 14-15. Those allegations are quite sufficient to constitute a constitutional deprivation of liberty actionable under § 1983. *Cf. Pyles* v. *Keane*, 418 F. Supp. 269, 276 (S.D.N.Y. 1976) (no action under § 1983 for malicious prosecution where plaintiff "fails to identify a single constitutional deprivation").

Cerbone also argues that *Hudson* v. *Palmer*, 52 U.S.L.W. 5052 (U.S. June 26, 1984), *Parratt* v. *Taylor*, 451 U.S. 527 (1981), and *Ingraham* v. *Wright*, 430 U.S.

651 (1977), taken together stand for the proposition that Conway is foreclosed from bringing her claims under § 1983 because the conduct of which she complains is tortious under state law. The argument proves too much; if true, we would have to say that the Court has sub silentio overruled *Monroe* v. *Pape*, 365 U.S. 167 (1961), where the Court addressed and rejected the proposition Cerbone now advances. *Id.* at 183. In addition, in both *Hudson*, 52 U.S.L.W. at 5055-57, and *Parratt*, 451 U.S. at 541-42; *id.* at 545 (Blackmun, J., concurring), the Court carefully limits its holdings to special situations involving deprivations of property, while in *Ingraham* the traditional and unique concerns of education, 430 U.S. at 668-83, supply the rationale for excusing teachers and schools from the due process obligations normally imposed on state actors who wish to flog people or the like.

Finally, Cerbone argues that substantive due process should not provide the source of Conway's due process rights. We may agree without denying that those rights have been violated.

3. Cerbone's third claim is that, despite *Pauk* v. *Board of Trustees*, 654 F.2d 856 (2d Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982), this court should withhold its determination of the statute of limitations issue, 750 F.2d at 212-13, pending the Supreme Court's disposition of *Knoll* v. *Springfield Township School District*, 699 F.2d 137 (3d Cir. 1983), *cert. granted*, 52 U.S.L.W. 3929 (U.S. July 2, 1984) (No. 82-1889), and *Garcia* v. *Wilson*, 731 F.2d 640 (10th Cir.) (en banc), *cert. granted*, 53 U.S.L.W. 3235 (U.S. Oct. 1, 1984) (No. 83-2146), where in both cases a normally applicable statute of limitations period was rejected in favor of a longer period for purposes of § 1983. Argument before the Supreme Court in

these two cases was heard on January 14, 1985. *See* 53 U.S.L.W. 3540 (U.S. Jan. 29, 1985). One can argue that this claim is mooted by *Fields* v. *Board of Higher Education*, 63 N.Y.2d 817, 482 N.Y. Supp. 2d 267 (1984), in which the New York Court of Appeals affirmed a decision which apparently holds that *state* law governing the statute of limitations for § 1983 actions prescribes a three-year time period. In any event, the applicability to this case of the Court's disposition of the Third and Tenth Circuit cases is speculative at best; Cerbone and the others may raise the issue, if need be, either at trial or after trial under Rule 60(b).

4. Cerbone's last claim is that Conway failed to allege that Cerbone, in his individual capacity, conspired with a state actor; therefore, Cerbone as an individual did not act "under color of law." This claim is flatly contradicted by paragraphs 10-14 of Conway's complaint, set out in the margin.[1] Detective McKinsey was the state

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[1] 10. Upon information and belief, on or before June 30, 1977, Defendant Vincent Cerbone conspired with Bano Buick, Inc., Alfred Martabano, and Alfred V. Martabano to arrest Plaintiff Lynn Conway without probable cause and did arrest Plaintiff upon the alleged crime of issuing a bad check in violation of Section 190.05-2 of the Penal Law of the State of New York for the sole and exclusive purpose of collecting a civil debt allegedly owed to Bano Buick, Inc., Alfred Martabano, and Alfred V. Martabano, thereby violating Plaintiff Lynn Conway's civil rights and the 14th Amendment redressable under *42 USC § 1983; 1985(3)*.

11. Upon information and belief, on or about June 28, 1977, the Village of Mount Kisco through its Police Department generally and Detective Larry McKinsey in particular, under color of law and in conspiracy acted beyond the scope of its authority and power by undertaking to act as Defendant Bano Buick, Inc. and Martabanos' private collection agency and threatening Plaintiff Lynn Conway with criminal arrest and criminal prosecution if she did not pay a civil debt allegedly

[Footnote continued on following page]

actor involved in drawing the criminal complaint in question, obtaining an arrest warrant, and making the arrest.

Judgment reaffirmed and cause remanded with Cerbone as codefendant.

[Footnote continued from previous page]

due. McKinsey, acting under color of law, had no lawful right to make such demands and threats on Plaintiff Lynn Conway, and thereby violated her civil rights under the 13th and 14th Amendments to the Constitution redressable under *42 USC § 1983; 1985(3)*.

12. Thereafter and on or about June 30, 1977, Defendant, the Village of Mount Kisco, under color of right, caused to be issued a warrant of arrest of Plaintiff, Lynn Conway. This warrant was allegedly based on the above-stated private criminal complaint brought by Bano Buick, Inc., Alfred Martabano, and Alfred V. Martabano against Plaintiff, all without probable cause or right to do so and in violation of Westchester County Law Section 700; redressable under *42 USC § 1983, 1985(3)*.

13. At all times herein, the Village of Mount Kisco, through its Police Department, acted without probable cause and in a fashion constituting abuse of process and malicious prosecution in that it aided and abetted Defendant Vincent Cerbone in perverting the law by threatening and bringing to lodge a criminal complaint against the Plaintiff Lynn Conway for the sole purpose of settling a civil debt, all without proper police investigation *(42 USC 1985[3], § 1983)*.

14. The Defendant Village of Mount Kisco and Defendant Vincent Cerbone conspired with Bano Buick, Inc., Alfred Martabano, and Alfred V. Martabano, by executing said arrest warrant against Plaintiff, Lynn Conway. On June 30, 1977, at approximately 7:00 p.m., Lynn Conway was arrested and taken into custody to the Mount Kisco Village Police Station and there imprisoned and detained for a period of seven (7) hours prior to arraignment on the misdemeanor complaint, all against her will.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 91 — August Term, 1984

(Argued: October 18, 1984 Decided: December 11, 1984)

Docket No. 83-7318

LYNN H. CONWAY,

Appellant,

v.

THE VILLAGE OF MOUNT KISCO, New York: VINCENT CERBONE as Justice of the Village Court, Village of Mount Kisco, New York; DETECTIVE LARRY MCKINSEY, Officer of the Village of Mount Kisco Police Department,

Defendants,

and

BANO BUICK, INC.; ALFRED MARTABANO, individually and as an officer of Bano Buick, Inc.; and ALFRED V. MARTABANO, individually and as an officer of Bano Buick, Inc.,

Appellees.

Before:

OAKES and WINTER, *Circuit Judges*, and CLARIE, *District Judge*.*

Complaint under 42 U.S.C. §§ 1983 and 1985 dismissed by United States District Court for the Southern District of New York, Mary Johnson Lowe, *Judge*, for failure to state a claim and on other bases.

On appeal by pro se appellant, judgment reversed and remanded in part, affirmed in part.

Lynn H. Conway, *Appellant Pro Se*.

George J. Calcagnini, Calcagnini & Lichtenstein, Mount Kisco, NY, *for Appellees Bano Buick, Inc., Alfred Martabano, and Alfred V. Martabano*.

OAKES, *Circuit Judge*:

Lynn Conway, pro se, appeals from a judgment of the Southern District of New York, Mary Johnson Lowe, Judge, dismissing her complaint alleging causes of action under 42 U.S.C. §§ 1983, 1985 (1982). The case arises out of a prosecution of Ms. Conway initiated by an automobile dealer for issuing a bad check in violation of N.Y. Penal Law § 190.05 (McKinney 1975),[1] for purposes of

* Of the District of Connecticut, sitting by designation.

1 N.Y. Penal Law § 190.05(2) provides in part:

A person is guilty of issuing a bad check when:

. . . .

[Footnote continued on following page]

paying a repair bill. Ms. Conway's complaint advances claims in the nature of those for arrest without probable cause, false imprisonment, malicious prosecution, and conspiracy. She complains that the defendants initiated and maintained a prosecution against her even though aware that her check had been dishonored not for lack of sufficient funds, but because she had ordered her bank to stop payment on the check.

FACTS

The complaint named as defendants Bano Buick, Inc. ("Bano Buick"), a New York corporation doing business as an auto dealer; Alfred Martabano and Alfred V. Martabano ("the Martabanos"), president and vice president of Bano Buick, and father and son, respectively; Vincent Cerbone, the attorney for Bano Buick and, during the relevant time period, concurrently a justice of the Village of Mount Kisco; Larry McKinsey, a detective in the Mount Kisco police department, who arrested Ms. Conway; and the Village of Mount Kisco. From the record, the affidavits, and the exhibits attached thereto, including a portion of the transcript of the deposition of defendant Alfred V. Martabano, the following facts appear.

On or about April 15, 1977, Ms. Conway brought a 1973 Opel that she and her husband owned to Bano Buick for repair work in connection with the engine. Evidently, there was a dispute as to whether Bano Buick was to

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[Footnote continued from previous page]

2. (a) He passes a check knowing that the drawer thereof does not then have sufficient funds with the drawee to cover it, and (b) he intends or believes at the time the check is passed that payment will be refused by the drawee upon presentation, and (c) payment is refused by the drawee upon presentation.

Issuing a bad check is a class B misdemeanor.

obtain Mr. Conway's prior approval concerning a replacement engine; in any event, a replacement engine was installed.[2] After some discussion[3] Ms. Conway drew a check dated May 10, 1977, in the amount of $431.34 on the Conways' joint account at Dry Dock Savings Bank. Evidently, when the automobile stalled and coughed on its way to her house, she went the next morning to the bank and stopped payment on the check.

Bano Buick subsequently received an advice from its bank, Bankers Trust Co., dated May 18, 1977, that Ms. Conway's $431.34 check had been unpaid by reason of "insufficient" funds. According to the senior Martabano's affidavit, Bano Buick then made unsuccessful attempts to contact Ms. Conway by telephone on seven separate occasions between May 31 and June 21, 1977, at which point the junior Martabano discussed the matter with Bano Buick's attorney, Vincent Cerbone, who advised that the issuance of a bad check constituted a violation of New

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[2] A state court action was instituted before the federal action by Ms. Conway against the same defendants in tort. Rather extensive discovery in that action took place. The state court examination before trial (EBT) of Alfred Martabano (the father) is included in our record, appended to a post-appeal motion filed by Ms. Conway on September 1, 1983. In it, Mr. Martabano states that Bano Buick replaced the Conways' engine with a junkyard engine obtained from Bedford Auto Wreckers. According to the Conways' EBTs, the engine stopped working on their way home from the garage. While these EBTs were not before the district court at the time of its dismissal orders, excerpts from the EBT of Alfred V. Martabano (the son) were appended to Ms. Conway's opposition affidavit. The district court was thus aware of the state court proceedings. It might have been helpful to the court, as well as to us, if it had referred to these EBTs before ruling.

[3] The Conways' EBTs indicate that the Bano service manager told them they would have to pay to remove the engine and put another one in.

York criminal law.[4] His affidavit further states that, on advice of counsel, Bano Buick contacted the police department of the Village of Mount Kisco, and it was not until June 30, 1977, that Ms. Conway was arrested and charged with issuing a bad check.

Ms. Conway's affidavit, on the other hand, states that the reverse side of the check shows quite clearly the "stop payment" disposition by the bank, and that furthermore the face of the check shows the word "stop." Attached to her affidavit is a copy of an undated letter from Dry Dock Savings Bank to her husband, Jeffrey Conway, stating that the bank's advice to him of May 25, 1977, should have been marked "payment stopped" instead of "insufficient" funds. Here we note that Ms. Conway makes the point in her brief, not made in her affidavit, that she expressly told the Martabanos that the check was not a problem of insufficient funds but a matter of stopped payment, and that the bank had erroneously marked the check "insufficient funds" and would verify that matter.[5] Nor does her affidavit include her current claim that when the Martabanos put the check through the bank a second time, the bank again returned it sometime after May 26, this time correctly marked "stop payment." Finally, her affidavit does not include her current claim that while her husband attempted to settle the matter with the Martabanos, the Martabanos attempted to collect the original debt, among other ways, by having her called late at night

[4] According to Alfred Martabano's EBT, however, he did talk with Ms. Conway by telephone (as she also testified), at which time Ms. Conway told him that her husband would call back. While Mr. Conway did not do so, he did meet Mr. Martabano in person to discuss the engine matter. The two were apparently unable to work things out; and after a few more calls to the Conways seeking payment, Martabano, Sr., called Vincent Cerbone, who told him to have his son deliver the check to Cerbone.

[5] Ms. Conway's brief is, however, consistent with her EBT.

(11:00 p.m. on June 28, 1977), by Detective McKinsey, who threatened her with arrest.[6]

Notwithstanding the deficiencies in Ms. Conway's affidavit, her allegations are supplemented by the deposition testimony of the defendants. For example, it appears from the deposition of Alfred V. Martabano that the Martabanos consulted Vincent Cerbone after they had received the second advice indicating that the check had been dishonored because of the stop payment order, and that the second advice was shown to Attorney/Justice Cerbone. Alfred V. Martabano testified that Cerbone told him that the first return notice for insufficient funds "is a criminal whatever" and that "the second had no bearing upon it, because it is an action after the fact." He also told Martabano to take the check to the police department, which Martabano did, giving it to Detective McKinsey.

Beyond this, when the district court granted summary judgment in the defendant's favor, it noted that Conway's affidavit "includes no facts which would demonstrate that she tried to resolve or explain the matter to defendants." Her affidavit states, however, that the check facially indicated that payment had been stopped, as did the reverse of the check. It also states that before the Martabanos initiated their private criminal complaint, they were in possession of knowledge that payment had been stopped on the check and that the original advice indicating insufficient funds had been in error. It further states that Ms. Conway had never before bounced a check, and that it was "the custom and practice of Dry Dock Savings Bank to honor my checks even when the balance

[6] These statements are also supported by the EBTs. The call lends color to the claim that the detective was using official authority to act as a private collection agent.

did not cover the amount being drawn." Finally, her affidavit states that "[i]n this case, I had sufficient funds to cover the check when drawn and had I not stopped payment on this check I would have made the deposit the morning following the day written." The record discloses that at the time the check was drawn, there was $441.37 in the account, although two checks had been drawn against it, one for $49.60 and one for $30, and were outstanding. Moreover, the record shows that on May 17, 1977, within the ten-day affirmative-defense requirement of N.Y. Penal Law § 190.15,[7] the Conways deposited $686.97 to their account, giving them an outstanding balance on May 17 of $1,048.74. Thus Ms. Conway could argue with some persuasiveness that at all times there were sufficient funds available to cover the check.

It is undisputed that on June 30, 1977, Ms. Conway was arrested pursuant to an arrest warrant obtained from an acting village justice by Detective McKinsey on Alfred V. Martabano's complaint. Allegedly the detective but not the subscribing village justice had knowledge both of the correct reason that the check had been returned and of the bank's acknowledgment of its error. Ms. Conway also alleges that she was then imprisoned and detained at the Mount Kisco Village police station for some seven hours prior to being arraigned; and that, despite repeated demands and requests, the defendants refused to dismiss the complaint or subsequently to commence a jury trial. Eventually, the complaint was dis-

[7] Section 190.15 (McKinney 1975) reads in part:
Issuing a bad check; defenses
In any prosecution for issuing a bad check, it is an affirmative defense that:
1. The defendant or a person acting in his behalf made full satisfaction of the amount of the check within ten days after dishonor by the drawee . . . .

missed, with the consent of the district attorney. The senior Martabano's affidavit states, however, that while the criminal charge was dismissed on September 20, 1979, dismissal was not on the merits but rather, with the consent of the district attorney, "in the interests of justice due to the delay in prosecution." The docket entries in the village court, appearing in the record in uncertificated form (incorporated in Vincent Cerbone's affidavit seeking attorney's fees against Ms. Conway in the district court, incorporated in our record), show that an assistant district attorney appeared in court on August 30, 1979, before Justice Joseph Cerbone, who is apparently the brother of Vincent T. Cerbone, and made a motion to withdraw the charge pending against Ms. Conway, even though the docket entry of August 16, 1979, shows that Joseph Cerbone had disqualified himself from the case. The argument on August 30 by the assistant district attorney, according to the docket entry, was that the "time period has passed and makes [*sic*] it extremely difficult to prepare for any kind of case." Justice Joseph Cerbone denied the motion. Finally, on September 20, 1979, the docket entry shows that "People move to withdraw the charge (Lynn Farrell, ADA) due to the period of time that has elapsed (not on the merits)." The person who inserted the parenthetical words "not on the merits" is not identified, but Vincent Cerbone does state in his affidavit that "[a]lthough I disqualified myself from acting on this case for the reasons stated in the attached decision dated 7 March 1978 (Exhibit D) [alluding to his prior representation of Bano Buick], I nonetheless decided the motion to dismiss the accusatory instrument because at the time, I was the only available town justice." The appropriateness of the docket entry parenthetical "not on the merits" is thus highly debatable, since it was made before a judge who not only had been counsel for the

complainant and was a potential defendant in a false arrest, malicious prosecution, or civil rights action but also had disqualified himself in the criminal case previously thereto.

On January 15, 1980, Ms. Conway commenced an action in the Supreme Court of the State of New York, Westchester County, against the Martabanos, Bano Buick, Vincent Cerbone, Detective McKinsey, the Police Department of Mount Kisco, and the Village of Mount Kisco, seeking damages for assault, false arrest, and malicious prosecution. By order dated July 23, 1982, the court granted Detective McKinsey's motion for summary judgment relying upon his defense of quasi-judicial immunity and by order dated July 30, 1982, also granted his motion to dismiss for lack of jurisdiction due to improper service of summons. On May 14, 1982, the Appellate Division, Second Department, granted the Village of Mount Kisco's motion to dismiss for failure to serve a proper notice of claim.[8] *Conway* v. *Bano Buick, Inc.*, 88 A.D.2d 609, 450 N.Y.S.2d 56 (1982).

On June 7, 1982, while Ms. Conway's state court action was pending, she filed her federal court complaint alleging civil rights violations for the same conduct by the state court defendants. On January 21, 1983, the federal district court granted Vincent Cerbone's motion for judgment on the pleadings, holding that the claims against him involved actions taken in his capacity as a justice of the village court and were therefore subject to

[8] The Appellate Division held that Ms. Conway had failed to comply with section 50-e of the General Municipal Law in that her notice of claim against the village was served upon an administrative aide to the director of the Office of Community Development rather than the village mayor, clerk, or a trustee.

absolute immunity. In a memorandum opinion and order dated March 14, 1983, the district court granted the remaining defendants' motions for dismissal, ordering that Ms. Conway's complaint be dismissed "in all respects." In granting Mount Kisco's motion to dismiss, the district court first upheld the preclusive effect of the prior judgment of the Appellate Division dismissing virtually identical claims against Mount Kisco, then rejected Mount Kisco's sovereign immunity defense, but finally dismissed the claims against Mount Kisco in view of Ms. Conway's failure to allege that her injury stemmed from a policy or custom authorized or observed by the municipality.

The district court also found partial merit in the Martabanos/Bano Buick defendants' statute of limitations defense. It first determined a § 1983 action to be governed by the three-year statute of limitations defined at N.Y. Civ. Prac. Law § 214(2) (McKinney 1972). It then held that Ms. Conway's claims based upon the alleged assault and false arrest on June 30, 1977, were barred, but that Ms. Conway's claim based upon the alleged malicious prosecution survived, citing *Park* v. *Board of Trustees*, 654 F.2d 856 (2d Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982). The district court then proceeded to dismiss the malicious prosecution claim on the merits:

> When plaintiff's check was returned by defendants' bank with a notice of insufficient funds, defendants repeatedly attempted to contact plaintiff by telephone. After each call met with no success, defendants concluded that plaintiff had issued the check in bad faith, and instituted the criminal complaint upon advice of counsel, and without malice.

The district court further found that the "defendants had reasonable cause for filing a criminal complaint," and that therefore Ms. Conway could not recover damages for malicious prosecution, citing *Ivery* v. *United States*, 686 F.2d 410, 413 (6th Cir. 1982), *cert. denied*, 460 U.S. 1037 (1983).

For the reasons below set forth, we affirm the judgment of the district court dismissing the claims against the Village of Mount Kisco, Detective McKinsey, and Vincent Cerbone in his capacity as Village Justice; but reverse the dismissal of the individual and conspiracy claims in the nature of malicious prosecution against the Martabanos, Bano Buick, and Vincent Cerbone in his capacity as an individual.

Discussion

Notice of Appeal

The notice of appeal was filed by former counsel on April 21, 1983. It states that an appeal is being taken from "an Order dated March 14, 1983, granting defendant Martabanos' Motion to Dismiss Plaintiff's Complaint . . . and from each and every part of said order." The appeal raises issues of timeliness and scope.

The timeliness of the appeal is an issue quickly resolved. The appellees misapprehended that the notice of appeal was filed on April 29, 1983, more than thirty days after the entry of judgment on March 25, 1983. The record clearly shows, however, that the notice of appeal was filed on April 21, 1983. Accordingly, this court has jurisdiction to review the appeal.

The issue concerning the scope of the notice of appeal is more complex.

1. *Vincent Cerbone.* Because the complaint alleged multiple claims against multiple parties, the January 7, 1983, order granting Cerbone's motion to dismiss could not be appealed until the district court disposed of the remaining claims against the remaining parties, absent a Fed. R. Civ. P. 54(b) certification that "there is no just reason for delay" upon an express direction for entry of judgment. No such certification was made. Disposition of the case did not occur until the final judgment was entered on March 25, 1983, pursuant to a memorandum opinion and order dated March 14 stating that the district court was "compelled to hold that the named defendants did not deprive the plaintiff of any constitutionally protected right," thus rendering the "[c]omplaint herein . . . in all respects dismissed."

The notice of appeal, however, does not mention the order of January 17, 1983, though of course it refers to the order dated March 14, 1983. But this omission is of no consequence, for although an appellant is required, under Rule 3(c) of the Federal Rules of Appellate Procedure,[9] to "designate the judgment, order or part thereof appealed from," it is well settled that courts should apply a liberal interpretation to that requirement. *See United States* v. *Ward*, 696 F.2d 1315, 1318 n.2 (11th Cir.), *cert. denied*, 103 S. Ct. 2101 (1983); *Cobb* v. *Lewis*, 488 F.2d

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[9] Fed. R. App. P. 3(c) reads in part:

> (c) *Content of the Notice of Appeal.* The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. . . . An appeal shall not be dismissed for informality of form or title of the notice of appeal.

41, 44-46 (5th Cir. 1974); *Terkildsen* v. *Waters*, 481 F.2d 201, 206 (2d Cir. 1973). *See generally Foman* v. *Davis*, 371 U.S. 178, 181-82 (1962); 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* § 3949, at 355-56 (1977). Our task is to interpret the notice of appeal so as to remain faithful to the intent of the appellant, fair to the appellee, and consistent with the jurisdictional authority of this court. *See Foman* v. *Davis*, 371 U.S. at 181-82; *Terkildsen*, 481 F.2d at 206.

We conclude that we should review the dismissal of the claims against Cerbone. The order dated March 14, 1983, dismissed the complaint "in all respects." It is perfectly clear that Ms. Conway had no desire to abandon the adverse disposition of her claims against Cerbone.[10] To be sure, the appellant, acting pro se, seems at times under the mistaken impression that prejudice has resulted from her failure to take an immediate appeal from the order dismissing her claims against Cerbone. But her notice of appeal reflects the intent to appeal all adversely determined dispositions from which an appeal could lawfully be taken at the time her notice of appeal was filed. No court would exploit a pro se litigant's misperception of its jurisdiction.

Of equal importance, however, is that our interpretation of the notice of appeal be fair to Mr. Cerbone. We note initially that although Rule 3(c) requires that those taking an appeal be specified in the notice of appeal, it does not require that appellees be specified. *See Perington Wholesale, Inc.* v. *Burger King Corp.*, 631 F.2d 1369, 1379 (10th Cir. 1979); 9 J. Moore, B. Ward & J. Lucas,

[10] Her intention to continue her action against Cerbone is manifest not only on inspection of her brief on appeal but her trial-court post-judgment supplemental affidavit dated September 2, 1983.

Moore's Federal Practice ¶ 203.16, at 3-69 (2d ed. 1983). The distinction is, of course, justified by the fact that notice of appeal is *served* upon the appellees. In that respect, it appears that the notice of appeal here was served on all defendants by the clerk of the district court. Moreover, Ms. Conway's supplemental affidavit in opposition to Cerbone's ill-advised motion for attorney's fees, which was obviously served on him, expressly requested reinstatement of her claims against him, at least in his capacity as attorney. Cerbone, then, was certainly on notice that Ms. Conway was taking steps to preserve the vitality of her claims against him.

He has not, however, filed a brief on appeal, doubtless in the belief that he is not a party, an interpretation that is not unreasonable. Accordingly, although we here necessarily review the district court's order dismissing the claims against all defendants, we set forth instructions below that provide Mr. Cerbone with the opportunity to brief his position before the mandate of this court takes effect against him. *See Perington Wholesale*, 631 F.2d at 1380. Thus what we say as to him is preliminary and tentative only.

2. *Detective McKinsey and the Village of Mount Kisco.* Both Detective McKinsey and the Village of Mount Kisco are also proper appellees. While the dismissal of the claims against them was also not specifically mentioned in the notice of appeal, Ms. Conway clearly intended that no claim against any of the defendants be abandoned, the claims against the detective and Mount Kisco were dismissed in the same order that dismissed the claims against the Martabanos, and there is therefore even less justification for avoiding, on technical grounds, a review of those claims.

However, neither Detective McKinsey nor Mount Kisco has filed briefs on appeal, although they also were apparently served with notice of the appeal. Fairness would require that they also be afforded the opportunity to brief arguments in support of their respective positions, but, because we are required to affirm the dismissal of the claims against them, it will be unnecessary for them to do so.

3. *The Martabanos and Bano Buick.* The notice of appeal presents no problem with respect to the Martabanos and Bano Buick (hereafter subsumed in reference to the Martabanos).

Statute of Limitations

The New York statute of limitations for false imprisonment or malicious prosecution actions is one year. N.Y. Civ. Prac. Law § 215(3) (1972). However, this court in *Pauk*, 654 F.2d at 866, and *Singleton* v. *City of New York*, 632 F.2d 185, 189-90 (2d Cir. 1980), *cert. denied*, 450 U.S. 920 (1981), held that a different statutory provision, N.Y. Civ. Prac. Law §214(2), prescribing a three-year limitations period, governs section 1983 claims, which are "significantly different from" state torts, *Monroe* v. *Pape*, 365 U.S. 167, 196 (1961) (Harlan, J., concurring). There is no reason to depart from the holdings of *Singleton* and *Pauk*, which we incorporate herein by reference.

Applying section 214(2) to this case, it is clear that while Ms. Conway's civil rights claims based upon arrest or false imprisonment are barred by the statute, her civil rights claim based upon malicious prosecution is not. *See Singleton*, 632 F.2d at 193. We must therefore identify

those defendants who remain liable for damages based upon Ms. Conway's malicious prosecution claim.

The Claims Against the Village of Mount Kisco

Contrary to the holding of the district court, the doctrine of res judicata does not bar Ms. Conway's claims against Mount Kisco, because the prior judgment in the village's favor—a dismissal of Ms. Conway's claims for failure to serve properly a notice of claim—was not a judgment on the merits. *See Expert Electric, Inc.* v. *Levine,* 554 F.2d 1227, 1232-33 (2d Cir.), *cert. denied,* 434 U.S. 903 (1977); *Kaplan* v. *Bennett*, 465 F. Supp. 555, 559 (S.D.N.Y. 1979). *See generally* Restatement (Second) of Judgments § 20(2) (1982). The district court, however, correctly held that because Ms. Conway did not allege that her injury stemmed from the execution of a custom or policy of Mount Kisco, the village cannot be liable under § 1983. *See Owen* v. *City of Independence*, 445 U.S. 622, 657-58 (1980); *Monell* v. *Department of Social Services*, 436 U.S. 658, 690-92 (1978). Dismissal of the claims against Mount Kisco was thus correct.

The Claims Against Detective McKinsey

Detective McKinsey was granted summary judgment on July 23, 1982, in Ms. Conway's state court action, which alleged claims virtually identical to the claims in her § 1983 action. Although the supreme court granted summary judgment to Detective McKinsey on the dubious ground that McKinsey, a member of the Mount Kisco police department, was entitled to quasi-judicial immunity, *see, e.g., Whitmore* v. *City of New York,* 80 A.D.2d 638, 640, 436 N.Y.S.2d 323, 325 (1981) (city may be liable for conduct of police officers constituting

malicious prosecution), *appeal dismissed*, 54 N.Y.2d 603, 443 N.Y.S.2d 1026, 426 N.E.2d 755 (1981); *Caminito* v. *City of New York*, 45 Misc. 2d 241, 250-51, 256 N.Y.S. 2d 670, 680 (1965) (police officers may be liable in action for malicious prosecution), we lack the authority to disturb its judgment. As a result, res judicata bars Ms. Conway the claim. *See Allen* v. *McCurry*, 449 U.S. 90 (1980).

The Claims Against Vincent Cerbone

Dismissal of the claims against Vincent Cerbone on the ground that he was entitled to an absolute immunity by virtue of his status as a village justice was erroneous to the extent that they assert conduct in the dual capacity as a private lawyer. Despite his insistence to the contrary, the complaint alleged claims against him not only in his capacity as town justice but also in his capacity as private counsel for Bano Buick.[11] In dismissing all of the claims against Cerbone, the district court either in-

[11] Paragraph 9 of the complaint states that "[e]ach and all of the acts of the Mt. Kisco Defendants alleged herein were done by Defendants . . . *as individuals* and as government employees." (Emphasis added.) Paragraph 10 of the complaint alleges that "on or before June 30, 1977, Defendant Vincent Cerbone conspired with Bano Buick, Inc., Alfred Martabano, and Alfred V. Martabano to arrest Plaintiff Lynn Conway without probable cause and did arrest Plaintiff . . . ." Paragraph 14 alleges that Cerbone "conspired with Bano Buick, Inc., Alfred Martabano, and Alfred V. Martabano, by executing said arrest warrant against Plaintiff Lynn Conway." Paragraph 9 expressly alleges claims against Cerbone as an individual, while paragraphs 10 and 24 allege claims concerning Cerbone's conduct that are coherent only when attributed to Cerbone acting in his individual capacity as attorney for Bano Buick, Inc. In contrast, compare paragraph 16 of Ms. Conway's complaint, which alleges that "Defendant Vincent Cerbone *as Village Justice* permitted, encouraged, and acquiesced in allowing the malicious and groundless criminal charges to continue against Plaintiff Lynn Conway from June 30, 1977, until September 20, 1979." (Emphasis added.)

correctly applied the doctrine of judicial immunity to conduct attributable to him as an individual or simply overlooked the claims against him in his capacity as an individual. In either case, we must reverse, subject to the proviso set forth below.

The Malicious Prosecution Claim

It remains to determine the substantive vitality of the claim of malicious prosecution against the Martabanos, Bano Buick, Inc, and Vincent Cerbone as an individual.[12] Because there are no federal rules of decision for adjudi-

[12] The Martabanos properly do not question their liability to suit as private litigants under § 1983, despite *Lugar* v. *Edmondson Oil Co.*, 457 U.S. 922 (1982) (action under § 1983 against a private party alleging that his invocation of a state statutory prejudgment attachment procedure had resulted in plaintiff's loss of property without due process). *See also Dahlberg* v. *Becker*, No. 84-7219, slip op. at 6817 (2d Cir. Nov. 9, 1984) (suit only against private party must allege unconstitutionality of state statute or procedure). While Ms. Conway alleges the unconstitutionality of neither N.Y. Penal Law § 190.05(2) nor any state-authorized procedure executed by any of the defendants during her prosecution, she does allege that state officials—Detective McKinsey and Vincent Cerbone in his capacity as village justice—*conspired* with and acted jointly with the Martabanos to violate her rights under the Fourteenth Amendment, committing overt acts in furtherance of the conspiracy to do so. Thus, the relevant precedent is not *Lugar*, but rather *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144 (1970). *Lugar* incidentally implicitly reflects the current vitality of *Adickes;* while Justice White, writing for the Court, and Justice Powell, in vigorous dissent, voice conflicting views concerning whether in the portion of *Adickes* relating to refusal of service the Court intended that different standards should govern the satisfaction of the state action and "under color of law" requirements, both the Court, 457 U.S. at 930-32, and Justice Powell, *id.* at 954-56, accept the proposition that private litigants engaged in a conspiracy with state officials to violate the Fourteenth Amendment are amenable to a cause of action under § 1983—whether as state actors by virtue of conspiratorial conduct with state officials, or as private actors who, acting in conspiratorial concert with state actors, thereby act under color of law.

cating § 1983 actions that are based upon claims of malicious prosecution, we are required by 42 U.S.C. § 1988 to turn to state law—in this case, New York state law—for such rules.[13] In doing so, we find that New York law permits recovery on a claim of malicious prosecution only where plaintiff has established four elements:

> (1) the defendant either commenced or continued a criminal proceeding against him; (2) that the proceeding terminated in his favor; (3) that there was no probable cause for the criminal proceeding; and (4) that the criminal proceeding was instituted in actual malice.

Russo v. *New York*, 672 F.2d 1014, 1018 (2d Cir. 1982) (quoting *Martin* v. *City of Albany*, 42 N.Y.2d 13, 16, 364 N.E.2d 1304, 1307, 396 N.Y.S.2d 612, 614 (1977); *Broughton* v. *State*, 37 N.Y.2d 451, 457, 335 N.E.2d 310, 314, 373 N.Y.S.2d 87, 94, *cert. denied*, 423 U.S. 929 (1975), *modified*, 721 F.2d 410 (2d Cir. 1983)). It clearly appears that the first such element has been satis-

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[13] Section 1988 reads in relevant part:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title . . . for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause . . .

See Burnett v. *Grattan*, 52 U.S.L.W. 4916, 4918 (U.S. June 27, 1984); *Board of Regents* v. *Tomanio*, 446 U.S. 478, 484-85 (1980).

fied, since the Martabanos and Bano Buick, Inc., commenced and continued the criminal proceeding against Ms. Conway. As noted above, it also appears that a trial would be necessary to resolve factual issues concerning the third element—whether there was probable cause for initiating the criminal proceeding; as well as the fourth element—whether the criminal proceeding was instituted with actual malice. The only question for resolution here concerns the second element—whether as a matter of law the proceeding terminated in Ms. Conway's favor.

In *Singleton*, 632 F.2d at 193, the termination of a criminal proceeding after adjournment in contemplation of dismissal was not held to be tantamount to a complete acquittal for purposes of bringing a civil rights claim. In *Russo*, 672 F.2d at 1019, which followed *Halberstadt* v. *New York Life Insurance Co.*, 194 N.Y. 1, 10-11, 86 N.E. 801, 803-04 (1909), a determination made in favor of the accused on the merits was found to be a favorable termination, but where it is not based on the merits, the dispositive inquiry—to be made factually—was found to be whether the failure to proceed implies a lack of reasonable grounds for the prosecution. *See also Loeb* v. *Teitelbaum*, 77 A.D.2d 92, 101, 432 N.Y.S.2d 487, 494 (1980) (favorable termination where failure to proceed "impl[ies] a lack of reasonable grounds for the prosecution"), *amended*, 80 A.D.2d 838, 439 N.Y.S.2d 300 (1981).

In this case, we do not know whether the dismissal of Ms. Conway's prosecution was made on the merits. While the copy of the village court docket entries parenthetically indicates that the dismissal was "not on the merits," the entry itself was made before Vincent Cerbone, a justice who had disqualified himself from the case, and who had

acted as counsel for the complainants, even advising them to bring it. We assume that a justice has control over his own docket, and therefore, as we have said, such an entry is suspect on its face and surely not controlling.

Given the facts in the record before us, it would be a very bold district attorney who would have sought to press the bad check charge. Of course, whether there was a favorable termination for Ms. Conway is for the jury and the district court to determine as a matter of fact and law, *Russo*, 672 F.2d at 1020. Assuming that a prosecution was properly undertaken in the first instance,[14] the question of favorable termination clearly remains open. Here, in contrast to *Singleton*, there was no termination under N.Y. Crim. Proc. Law § 170.55. *See Russo*, 672 F.2d at 1024 (Feinberg, C.J., concurring). We think it easily possible, even on the present record, for the factfinder and the district court to determine that the termination in Ms. Conway's case was "sufficiently favorable to the accused to constitute a favorable termination." *Russo*, 672 F.2d at 1020; *see also Loeb*, 77 A.D.2d at 98, 432 N.Y.S.2d at 491-92.

In conclusion, we affirm the order of the district court dismissing the claims against the Village of Mount Kisco, Detective McKinsey, and Vincent Cerbone in his capacity as village justice. We reverse the order of the district court dismissing the claims in the nature of malicious prosecution against the Martabanos, Bano Buick, and Vin-

[14] The question is open on remand whether the prosecution could properly have been initiated without the district attorney's consent. *See* N.Y. County Law § 700(1) (McKinney 1972); *People v. Van Sickle*, 13 N.Y.2d 61, 192 N.E.2d 9, 242 N.Y.S.2d 34 (1963); *People v. Vlasto*, 78 Misc. 2d 419, 355 N.Y.S.2d 983 (1974). *But see People on Complaint of Allen v. Citadel Management Co.*, 78 Misc. 2d 626, 355 N.Y.S.2d (1974).

cent Cerbone in his individual capacity. We grant Vincent Cerbone permission to file a brief within thirty days from the date of entry of this judgment, should he desire to take issue with the tentative rulings of this court against him, judgment to be suspended until this court has had the opportunity to review his arguments and any reply thereto made within ten days thereafter by Ms. Conway.[15]

Judgment affirmed in part, reversed in part, and cause remanded.

[15] To reduce expense, the briefs may be submitted in single-spaced typewritten letter form, not to exceed eight pages (Cerbone) and four pages (Conway) respectively.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MEMORANDUM OPINION AND ORDER

82 Civ. 4521 (MJL)

LYNN H. CONWAY,

Plaintiff,

-against-

THE VILLAGE OF MOUNT KISCO, ET AL.,

Defendants.

APPEARANCES:

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MARY JOHNSON LOWE, D.J.

On January 15, 1980, plaintiff commenced an action against the above named defendants in the Supreme Court of the State of New York, Westchester County, requesting damages for an alleged assault, false arrest and malicious prosecution. On June 7, 1982 plaintiff instituted an action in this Court under 42 U.S.C. §1983 and §1985 against the same defendants for the same acts alleged in the State proceeding, the federal action alleges a deprivation of constitutional rights. Defendants Bano Buick, Inc., Alfred Martabano and Alfred V. Martabano have moved to dismiss pursuant to Rule 12(b) of the Fed.R.Civ.P., or in the alternative for summary judgment pursuant to Rule 56(b). Defendants Village of Mount Kisco and Detective Larry McKinsey have moved pursuant to Rule 12(c) for judgment on the pleadings. For the reasons stated below, the Court grants defendants' motions and the complaint is dismissed in all respects.

BACKGROUND

Plaintiff allegedly had engine work done on her car by defendant Bano Buick, Inc., ("Bano") 193 Main Street, Mount Kisco, New York on April 15, 1977. On May 10, 1977, plaintiff issued a check for $434.34 to Bano Buick for the work done. The check was not honored by plaintiff's bank for "insufficiency."

On June 28, 1977 plaintiff alleges that she was threatened with criminal arrest and prosecution by the Village of Mt. Kisco through its Police Department, generally, and defendant Detective Larry McKinsey, in particular, if she did not pay the civil debt allegedly due to Bano.

Plaintiff further alleges that defendant Bano and two of its officers, Alfred Martabano and Alfred V. Martabano, appeared before the local village justice (Justice Vincent Cerbone) and in conspiracy with the Justice, and the Village of Mt. Kisco, lodged a criminal complaint against the plaintiff "for the sole purpose of settling a civil debt" (Complaint, para. 13). On June 30, 1977 plaintiff was arrested pursuant to an arrest warrant which "was allegedly based on the above-stated private criminal complaint brought by Bano Buick, Inc., Alfred Martabano, and Alfred V. Martabano against Plaintiff, all without probable cause or right to

do so and in violation of Westchester County Law Section 700 . . . ." (Complaint, para. 12).

After being taken into custody, plaintiff alleges that she was imprisoned and detained at the Mt. Kisco Village Police Station for seven hours prior to being arraigned on the "misdemeanor complaint." (Complaint, para. 14).

Plaintiff further alleges that "[t]he Defendant Village of Mount Kisco and Defendant Vicent Cerbone as Village Justice permitted, encouraged, and acquiesced in allowing the malicious and groundless criminal charges to continue against [Plaintiff] from June 30, 1977, until September 20, 1979. Said Defendants refused to dismiss said charges, notwithstanding [Plaintiff's] repeated demands and requests to do so." (Complaint, para. 16).

"Defendants Village of Mount Kisco and Vincent Cerbone refused for a period from August 4, 1977, to the date of dismissal by the Westchester County District Attorney[1] September 20, 1979, to commence a jury trial as demanded by [Plaintiff] all in violation of Plaintiff's constitutional rights." (Complaint, para. 17).

Plaintiff requests compensatory, exemplary, and punitive damages in the amount of $1,000,000 for the first cause of action and $1,000,000 for the second cause of action; attorneys fees and costs; and a stay of the state court proceedings pursuant to 28 U.S.C. §2283 against Martabanos and Bano Buick, Inc., this federal court action being "the residual branch of a State action against all the herein defendants."

I. Prior Proceedings

By Order of the Westchester County Supreme Court, dated July 23, 1982, Detective McKinsey's motion for summary judgment on the grounds of quasi-judicial immunity was granted.

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[1] Martabano Affidavit, para. 6 submitted in support of motion to dismiss states:

> "[t]he dismissal was not on the merits but rather, with the consent of the District Attorney, it was dismissed in the interest of justice due to the delay in prosecution."

By order of the same court, dated July 30, 1982, Detective McKinsey's summary judgment motion to dismiss for lack of jurisdiction (improper service of summons) was granted.

In a Memorandum Opinion and Order, dated January 17, 1983, this Court granted the defendant Vincent Cerbone's motion for judgment on the pleadings on the ground that the complaints against him are for actions taken in his judicial capacity as a Justice of the Village Court and are therefore subject to complete immunity.[2]

II. Defendants' Motion to Dismiss

Since this Court has considered affidavits submitted by the parties the motions will be deemed motions under Fed.R.Civ.P. 56 rather than under Rules 12(b) and 12(c).

1. Local Rule 47

Defendants move to dismiss on the ground that the complaint was served by certified mail and is therefore insufficient to confer jurisdiction on this Court pursuant to Rule 4(d) F.R.C.P. Attached as plaintiff's Exhibits A-1, A-2 and A-3 to the Affidavit in Opposition are the Marshal's returns showing service by certified mail in accordance with Local Rule 47 which authorizes service by the Marshal by certified mail upon defendants. Since the defendants have been properly served and have appeared the motion to dismiss on this ground is in all respects denied.

2. General Municipal Law 50-e

As set forth above, the Appellate Division of the Supreme Court, Second Department, has ruled that these plaintiffs failed to serve the Notice of Claim required to institute an action against a municipality under New York State General Municipal Law 50. This holding of the Appellate Division must be accorded *res judicata* effect in this Court, *Allen* v. *McCurry*, 449 U.S. 90 (1980). However, the fact that plaintiffs are barred from suing

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[2] On April 1, 1981, the Supreme Court, Westchester County, denied the defendant Village of Mt. Kisco's motion to dismiss for failure to comply with Section 50-e of the General Municipal Law. On appeal to the Appellate Division, Second Department, this decision was reversed and the motion of appellant to dismiss the complaint was granted. Decision of Appellate Division reported in New York Law Journal, May 14, 1982.

the municipal defendants in the State action is not herein controlling. Section 50 of the General Municipal Law of the State of New York was enacted as a waiver of sovereign immunity for actions in tort against a municipality. *Pausley* v. *Chaloner*, 54 A.D. 2d 131, 388 N.Y.S. 2d 35 (1976). The Supreme Court held in *Owen* v. *City of Independence*, 445 U.S. 622 (1980) that in enacting §1983 Congress abolished whatever vestige of a State's sovereign immunity it possessed for violation of the federal constitution and federal law. Therefore, a defense of sovereign immunity does not bar an action under §1983.

3. **Statute of Limitations**

Plaintiff alleges that on June 28, 1977 Detective Larry McKinsey, of the Mt. Kisco Police Department, threatened to arrest her if she did not make good an alleged "bad check." Plaintiff further alleges that on June 30, 1977 a warrant was issued for her arrest and that she was arrested on that date. A criminal proceeding was instituted against plaintiff and was dismissed on September 20, 1979.

The Court of Appeals of this Circuit has held that a §1983 action is *governed* by the three year statute of limitations of N.Y.C.P.L.R. §214(2) and under federal law, the cause of action accrues at "'that point in time when the plaintiff knows or has reason to know of the injury which is the basis of his action.'" *Singleton* v. *City of New York et al.*., 632 F. 2d 185, 191 (2d Cir. 1980) (citation omitted), *cert. denied*, 450 U.S. 920 (1981). The *Singleton* Court further held that the date of arrest is the time plaintiff knows of his injury arising from the alleged assault and false arrest; malicious prosecution claims accrue the day the underlying action is terminated.

Applying the teaching of *Singleton* to the action within, plaintiff's claims based upon alleged assault and false arrest accrued on June 30, 1977, the date of her arrest. These claims are therefore dismissed as time barred.

Since plaintiff's claim based upon malicious prosecution was instituted within three years of the underlying state court dismissal, it survives the motion to dismiss for failure to comply with the applicable statute of limitations. *Pauk* v. *The Board of*

Trustees of the City University of New York, 654 F. 2d 856 (2d Cir. 1981), *cert. denied*, 102 S. Ct. 1631 (1982).

A careful reading of the pleadings and affidavits in support of and in opposition to the instant motion disclose that plaintiff contracted with defendant Bano for the repair of her car. She paid by check which was returned to Bano as "Insufficient." The individual Martabano defendants complained to the police department of the Village of Mt. Kisco. New York State Penal Law §190.05 provides:

> A person is guilty of issuing a bad check when . . .
>
> 2(a) He passes a check knowing that the drawer thereof does not then have sufficient funds with the drawee to cover it, and
>
> (b) he intends or believes at the time the check is passed that payment will be refused by the drawee upon presentation, and
>
> (c) payment is refused by the drawee upon presentation.
>
> Issuing a bad check is a Class B Misdemeanor.

New York Penal Law 190.10(1) provides:

> When the drawer of a check has insufficient funds with the drawee to cover it at the time of utterance, the subscribing drawer or respresentative drawer, as the case may be, is presumed to know of such insufficiency.

Plaintiff's Affidavit in Opposition indicates that:

> It was the custom and practice of Dry Dock Savings Bank to honor my checks even when the balance did not cover the amount being drawn. However, in this case, I had sufficient funds to cover the check when drawn and had I not stopped payment on this check, I would have made the deposit the morning following the day written."

(Plaintiff's Affidavit in Opposition, p. 6).

A warrant of arrest was issued and Detective McKinsey placed plaintiff under arrest. A complaint was filed and the proceeding was subsequently dismissed.

DISCUSSION

Plaintiff alleges that she was illegally and unjustly detained and charged under color of law in violation of her civil rights under the 13th and 14th Amendments of the United States Constitution (Complaint para. 15); that the charges were malicious and groundless, and that she was denied due process in the prosecution of said charges (Complaint. paras. 16, 17, 18 and 22). The specific constitutional deprivations alleged are:

> (b) The right of Plaintiff to be informed of the nature and cause of the accusation against her, secured to her under the Sixth and Fourteenth Amendments to the Constitution of the United States; and
>
> (c) The right of Plaintiff not to be deprived of life, liberty, or property without due process of law, and the right to equal protection of the laws, secured by the Fourteenth Amendment to the Constitution of the United States.
>
> (c) The 13th Amendment 42 USC §1985.

(Complaint para. 22).

The standard of review of a motion for summary judgment in a §1983 suit against individual and municipal defendants was set out recently in *Quinn* v. *Syracuse Model Neighborhood Corp.*, 613 F. 2d 438 (2d Cir. 1980). The Court of Appeals explained:

> [S]ummary judgment is appropriate only when a review of the entire record demonstrates 'that there is no genuine issue as to any material fact.' The burden, therefore, is on the moving party to establish that no relevant facts are in dispute. *Id.* at 444. (Citations omitted).

In determining whether there are issues to be tried, or whether the defendant has demonstrated the absence of material, disputed facts, the Court is not restricted by the conclusory allegations in

plaintiff's complaint. "[T]he mere possibility that a factual dispute *may* exist, without more, is not sufficient to overcome a convincing presentation by the moving party." *Id.* at 445 (emphasis in original). *See Mann* v. *Village of Walden*, 482 F. Supp. 154, 157 (S.D.N.Y. 1979). Plaintiff must "bring to the district court's attention some affirmative indication that his version of relevant events is not fanciful." *Quinn, supra* at 445.[3]

Plaintiff has made no allegation that the accusatory instrument filed against her in the Criminal Court did not inform her that she was charged under Penal Law §190.05 with issuing a bad check to Bano Buick, Inc. In the absence of such allegation, her conclusory pleading that she was not informed of the nature and cause of the accusation against her is insufficient to sustain a claim of violation of Sixth and Fourteenth Amendment rights.

---

[3] Plaintiff claims that the defendants were in possession of the the Stop Payment notice prior to instigating the private criminal complaint. (Plaintiff's Affidavit in Opposition, para. 11). In his deposition of March 3, 1981, Alfred Martabano states that the Stop Payment Advice and the check which had been returned for insufficient funds, were presented to his attorney after his repeated attempts at contacting plaintiff proved unsuccessful. Defendant Bano Buick in trying to resolve the matter, attempted contacting plaintiff by telephone on May 31, 1977, June 1, 1977, June 6, 1977, June 14, 1977, June 20, 1977, and June 21, 1977. "When each call was met with no success whatsoever, it became evident to the defendant that the check was given in bad faith." (Alfred Martabano Affidavit, p. 5).

Plaintiff has made no response to defendant's statement that repeated attempts were made to contact her by telephone. Her affidavit includes no facts which would demonstrate that she tried to resolve or explain the matter to defendants. She indicates only that "I will not at this point set forth all the facts and circumstances leading to this litigation." (Plaintiff's Affidavit, p. 6).

> Rule 56(e) provides in pertinent part:
>
> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment if appropriate, shall be entered against him.

Accordingly, the Court finds that since plaintiff has not provided specific facts showing that defendants were unreasonable in instituting the criminal complaint against her (e.g. that she had responded to their attempts to contact her and had informed them that the check had been returned in error), summary judgment must be entered against her.

In addressing her due process and equal protection claims some fundamental propositions must be set forth.

1. A municipality, or its agents are not liable for damages in a §1983 action under the theory of *respondent superior*. The plaintiff must plead that the municipality through some official custom or policy, knew of and adopted the practice which resulted in the alleged deprivation of plaintiff's constitutional rights. *Owens* v. *Haas*, 601 F. 2d 1242 (2d Cir. 1979) *cert. denied*, 444 U.S.980 (1980).

2. The Fourth Amendment, incorporated into the Fourteenth Amendment requires that a State provide a fair and reliable determination of probable cause as a condition for any significant pre-trial restraint of liberty. *Baker* v. *McCollan*, 443 U.S.137, 142 (1979). Under New York law a criminal prosecution is begun by filing an accusatory instrument with a criminal court (C.P.L.R. §100.05). Its purpose is to apprise defendant of the nature of the charge and to satisfy the magistrate that there is sufficient legal evidence to furnish reasonable ground for believing that the crime charged has been committed by the defendant. *People* v. *Harrison*, 58 Misc. 2d 636, 296 N.Y.S. 2d 684 (1968). If the magistrate finds the accusatory instrument is sufficient on its face, he may issue a warrant for the defendant's arrest (C.P.L.R §120.20).

The complaint in this case is devoid of any allegation that the Village of Mt. Kisco, through some official policy, wrongfully deprived this plaintiff of her constitutional rights. Plaintiff alleges that the individual defendants, the police department and the Justice of the Village conspired to maliciously charge the plaintiff with the crime of issuing a bad check "for the sole and exclusive purpose of collecting a civil debt allegedly owed to Defendants Bano Buick, Inc., Alfred Martabano, and Alfred V. Martabano. (Complaint para. 24).

This allegation fails to state a cause of action under §1983 or §1985. Even if the intent of the individual defendants were to use the criminal process to collect the debt allegedly owed, where the process used was in accordance with the law of the State of New York, and such process is not constitutionally defective, no federal cause of action is alleged.

Plaintiff's claim of malicious prosecution must fail. A malicious prosecution is begun in malice without probable cause to believe the charges can be sustained. It is undisputed on this record that plaintiff issued a check to Bano Buick, Inc. which was deposited and returned marked "insufficient." A check so returned is a violation of New York Penal Law §190.05 and §190.10(1), and the recipient of such check is a proper complainant in a criminal proceeding. When plaintiff's check was returned by defendants' bank with a notice of insufficient funds, defendants repeatedly attempted to contact plaintiff by telephone. After each call met with no success, defendants concluded that plaintiff had issued the check in bad faith, and instituted the criminal complaint upon advice of counsel, and without malice. (Alfred Martabano Affidavit, p. 5) Pursuant to New York Penal Law §190.05 and §190.10(1), defendants had reasonable cause for filing a criminal complaint. Therefore, plaintiff cannot recover damages for malicious prosecution. *See Ivery* v. *United States*, 686 F. 2d 410, 413 (6th Cir. 1982).

The evidence is likewise undisputed that a Justice of the Village issued a warrant for the arrest of plaintiff. Such warrant, under New York Law, is a judicial finding of probable cause to arrest. The fact that this plaintiff may have had a defense to the criminal charge, does not affect the validity of the initiation of the criminal proceeding. Since this Court finds no constitutional infirmity in the institution of the criminal proceeding, this Court is compelled to hold that that named defendants did not deprive the plaintiff of any constitutionally protected right. Complaint herein is in all respects dismissed.

It Is So Ordered.

Dated: New York, New York
March , 1983

.....

United States District Judge

ENDORSEMENT

LYNN H. CONWAY v.
THE VILLAGE OF MOUNT KISCO, NEW YORK

82 Civ. 4521

This is an action under 42 U.S.C. §1983 alleging violations of plaintiff's civil rights. Justice Vincent Cerbone, one of the defendants in this action, has moved for an order pursuant to Rule 12(c) of the Fed.R.Civ.P. granting him judgment on the pleadings. For the reasons stated below, the motion is granted.

Defendant Cerbone by this motion, contends that he is absolutely immune form this suit by virtue of the immunity accorded judges for acts done in the course of their judicial duty. Plaintiff, however, asserts that since Justice Cerbone continued to preside over the criminal matter after he had disqualified himself on August 4, 1977, he acted officially, but without jurisdiction. And therefore, there can be no judicial immunity where jurisdiction did not exist. (Plaintiff's Memorandum in Opposition, at p.3.)

Is well settled that judges are absolutely immune from civil suits for damages for acts committed within the scope of their judicial duties. *Stump v. Sparkman*, 435 U.S. 349, 355-56 (1978); *Pierson v. Ray*, 386 U.S. 547, 553-55 (1967.) This principle extends to damage actions brought under §1983. *Id.*

> "Noting that 'few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction,' *Pierson v. Ray, supra*, at 553-554, held that the absolute immunity traditionally accorded judges was preserved under §1983 ... where the immunity claimed by the defendant was well established at common law at the time §1983 was enacted, and where its rationale was compatible with the purposes of the Civil Rights Act, we have construed the statute to incorporate that immunity."

Owen v. City of Independence, Missouri, 445 U.S. 622, 637-38 (1979)

Judges are immune from civil liability for their judicial acts, even when the acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly. *Stump v. Sparkman, supra*, at 356 citing *Bradley v. Fisher*, 13 Wall. 335, 351 (1872.)

Since plaintiff's claims are restricted to acts alleged to have been committed by Justice Cerbone while acting in his judicial capacity, they are barred by the principle of judicial immunity. Therefore, defendant Cerbone's motion for judgment on the pleadings is granted.

It Is So Ordered.

.....
United States District Judge

Dated: January 17, 1983
New York, New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LYNN H. CONWAY,

Plaintiff-Appellant

-against-

THE VILLAGE OF MOUNT KISCO, *et al*,

Defendant-Respondent

NOTICE OF APPEAL

82 Civ. 4521

SIRS:

PLEASE TAKE NOTICE that Plaintiff, Lynn H. Conway hereby appeals to the United States Court of Appeals in the Second Circuit from an Order dated March 14, 1983 granting defendant Martabanos' Motion to Dismiss Plaintiff's Complaint pursuant to Rule 12(b) of Federal Rule of Civil Procedure and from each and every part of said order.

CHERICO & STIX
Attorneys for
Plaintiff-Appellant
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(914) 761-8791

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

LYNN H. CONWAY,

Plaintiff,

-against-

THE VILLAGE OF MOUNT KISCO, NEW YORK; VINCENT CERBONE as Justice of the Village Court, Village of Mount Kisco, New York; DETECTIVE LARRY MCKINSEY, Officer of the Village of Mount Kisco Police Department; BANO BUICK, INC.; ALFRED MARTABANO, individually and as an officer of the Bano Buick, Inc., and ALFRED V. MARTABANO, individually and as an officer of Bano Buick, Inc.,

Defendants.

VERIFIED COMPLAINT

Plaintiff by her attorneys, Cherico and Stix, as and for a Complaint alleges:

1. Plaintiff, Lynn H. Conway, is a citizen of the United States of America and resident of the County of Westchester, State of New York.

2. Defendant Village of Mount Kisco, New York, was and is a municipal corporation under the laws of the State of New York.

3. Defendants Vincent Cerbone as Justice of the Village Court, Village of Mount Kisco, New York, and Detective Larry McKinsey of the Village of Mount Kisco Police Department are now and at all times material hereto duly appointed employees of the Village of Mount Kisco, County of Westchester, a municipal corporation and governmental subdivision of the State of New York.

4. Upon information and belief and at all times relevant herein, Bano Buick, Inc. was and still is a duly organized New

York corporation chartered and existing under and by virtue of the Business Corporation Law of the State of New York and maintains a place of business at 193 Main Street, Mount Kisco, New York.

5. Alfred Martabano was and still is a resident of the County of Westchester and State of New York and is an officer of Bano Buick, Inc., 193 Street, Mount Kisco, New York.

6. Alfred V. Martabano was and still is a resident of the County of Westchester and State of New York and is an officer of Bano Buick, Inc., 193 Main Street, Mount Kisco, New York.

JURISDICTION AND VENUE

7. This action arises under the United States Constitution, particularly under the provisions of the 4th, 6th, 13th, and 14th Amendments to the Constitution of the United States and under Federal Law, particularly Title 42 of the United States Code, Section 1983, 1985(3).

8. This Court has jurisdiction of this cause under and by virtue of Title 28 of the United States Code, Sections 1343, 2202, and 2283.

9. Each and all of the acts of the Mount Kisco Defendants alleged herein were done by Defendants, and each of them as individuals and as government employees under the color and pretense of the statutes, ordinances, regulations, customs, and usages of the State of New York, the Village of Mount Kisco, and the County of Westchester, and under the authority of their office as policeman and Village Justice for such village and county. Venue lies in this district pursuant to 28 USC §1391.

AS AND FOR A FIRST CAUSE OF ACTION

10. Upon information and belief, on or before June 28, 1977, Defendant Vincent Cerbone conspired with Bano Buick, Inc., Alfred Martabano, and Alfred V. Martabano to arrest Plaintiff Lynn Conway without probable cause and did arrest Plaintiff upon the alleged crime of issuing a bad check in violation of Section 190.05-2 of the Penal law of the State of New York for the sole and exclusive purpose of collecting a civil debt allegedly

owed to Bano Buick, Inc., Alfred Martabano, and Alfred V. Martabano, thereby violating Plaintiff Lynn Conway's civil rights and the 14th Amendment redressable under *42 USC §1983; 1985(3)*.

11. Upon information and belief, on or about June 28, 1977, the Village of Mount Kisco through its Police Department generally and Detective Larry McKinsey in particular, under color of law and in conspiracy acted beyond the scope of its authority and power by undertaking to act as Defendant Bano Buick, Inc. and Martabanos' private collection agency and threatening Plaintiff Lynn Conway with criminal arrest and criminal prosecution if she did not pay a civil debt allegedly due. McKinsey, acting under color of law, had no lawful right to make such demands and threats on Plaintiff Lynn Conway, and thereby violated her civil rights under the 13th and 14th Amendments to the Constitution redressable under *42 USC §1983; 1985(3)*.

12. Thereafter and on or about June 30, 1977, Defendant, the Village of Mount Kisco, under color of right, caused to be issued a warrant of arrest of Plaintiff, Lynn Conway. This warrant was allegedly based on the above-stated private criminal complaint brought by Bano Buick, Inc., Alfred Martabano, and Alfred V. Martabano against Plaintiff, all without probable cause or right to do so and in violation of Westchester County Law Section 700; redressable under *42 USC §1983, 1985(3)*.

13. At all times herein, the Village of Mount Kisco, through its Police Department, acted without probable cause and in a fashion constituting abuse of process and malicious prosecution in that it aided and abetted Defendant Vincent Cerbone in perverting the law by threatening and bringing to lodge a criminal complaint against Plaintiff Lynn Conway for the sole purpose of settling a civil debt, all without proper police investigation *(42 USC 1985[3], §1983)*.

14. The Defendant Village of Mount Kisco and Defendant Vincent Cerbone conspired with Bano Buick, Inc., Alfred Martabano, and Alfred V. Martabano, by executing said arrest warrant against Plaintiff, Lynn Conway. On June 30, 1977, at

approximately 7:00 p.m., Lynn Conway was arrested and taken into custody to the Mount Kisco Village Police Station and there imprisoned and detained for a period of seven (7) hours prior to arraignment on the misdemeanor complaint, all against her will.

15. Plaintiff was not only illegally and unjustly arrested, detained, and charged, but was also subjected to great humiliation, ridicule, and mental anguish, all done under color of law and in violation of her civil rights under the 13th and 14th Amendments of the U.S. Constitution *(42 USC §1983, 1985[3])*.

16. The Defendant Village of Mount Kisco and Defendant Vincent Cerbone as Village Justice permitted, encouraged, and acquiesced in allowing the malicious and groundless criminal charges to continue against Plaintiff Lynn Conway from June 30, 1977, until September 20, 1979. Said Defendants refused to dismiss said charges, notwithstanding Lynn Conway's repeated demands and requests to do so.

17. Defendants Village of Mount Kisco and Vincent Cerbone refused for a period from August 4, 1977, to the date of dismissal by the Westchester County District Attorney, September 20, 1979, to commence a jury trial as demanded by Plaintiff Lynn Conway, all in violation of Plaintiff's constitutional rights.

18. Defendant Vincent Cerbone presided over said criminal matter, notwithstanding the fact that he had disqualified himself from said case on August 4, 1977. Subsequent to his August 4, 1977, disqualification, Defendant Vincent Cerbone decided Plaintiff's motion to dismiss against Plaintiff and in Defendants' favor, all in violation of Plaintiff's constitutional rights.

19. By reason of the illegal arrest of Plaintiff Lynn Conway and her unlawful detention and imprisonment, Plaintiff was required to and did employ legal counsel.

20. Plaintiff incurred reasonaable attorney's fees in the sum of $1200 in connection with the above criminal proceeding.

21. By reason of the conduct of Defendants, and each of them, including that of the unlawful arrest, imprisonment, and prosecution of Plaintiff, and the injuries sustained by Plaintiff

therefrom, Plaintiff sustained damages in the sum of $1,000,000.00.

22. The conduct of Defendants, and each of them, deprived Plaintiff of the following rights, privileges, and immunities secured to her by the Constitution of the United States.

(a) The right of Plaintiff to be secure in her person and effects against unreasonable search and seizure under the Fourth and Fourteenth Amendments to the Constitution of the United States;

(b) The right of Plaintiff to be informed of the nature and cause of the accusation against her, secured to her under the Sixth and Fourteenth Amendments to the Constitution of the United States; and

(c) The right of Plaintiff not to be deprived of life, liberty, or property without due process of law, and the right to the equal protection of the laws, secured by the Fourteenth Amendment to the Constitution of the United States.

(c) The 13th Amendment *42 USC 1985*.

AS AND FOR A SECOND CAUSE OF ACTION

23. Plaintiff Lynn Conway repeats and realleges each and every allegation contained in paragraphs of this Complaint denoted "1" through "22" as if fully set forth again herein at length.

24. Upon information and belief, on or about June 29, 1977, Defendants Bano Buick, Inc., Alfred Martabano, and Alfred V. Martabano, individually and as officers of Bano Buick, Inc., in conspiracy with the Defendant Vincent Cerbone as Justice of the Village of Mount Kisco, New York, maliciously charged the Plaintiff Lynn Conway of the crime of issuing a bad check in violation of Section 190.05-2 of the Penal Law of the State of New York, for the sole and exclusive purpose of collecting a civil

debt allegedly owed to Defendants Bano Buick, Inc., Alfred Martabano, and Alfred V. Martabano. Said defendants did, under color of statute of the State of New York, deprive Plaintiff Lynn Conway of her civil rights, privileges, and immunities secured to her by the Constitution of the United States and thereby violated her civil rights redressable under *42 USC §1983; 1985(3)*.

25. As a result of the above premises and facts, Plaintiff has been denied her constitutional rights and was detained, arrested, and imprisoned against her will.

26. By reason of the illegal arrest of Plaintiff Lynn Conway and her unlawful detention and imprisonment, Plaintiff was required to and did employ legal counsel.

27. Plaintiff incurred reasonable attorney's fees in the sum of $1200 in connection with the above criminal proceeding.

28. By reason of the conduct of Defendants, and each of them, including that of the unlawful arrest, imprisonment, and prosecution of Plaintiff, and the injuries sustained by Plaintiff therefrom, Plaintiff sustained damages in the sum of $1,000,000.00.

29. The conduct of Defendants, and each of them, deprived Plaintiff of the following rights, privileges, and immunities secured to her by the Constitution of the United States:

(a) The right of Plaintiff to be secure in her person and effects against unreasonable search and seizure under the Fourth and Fourteenth Amendments to the Constitution of the United States.

(b) The right of Plaintiff to be informed of the nature and cause of the accusation against her, secured to her under the Sixth and Fourteenth Amendments to the Constitution of the United States; and

(c) The right of Plaintiff not to be deprived of life, liberty, or property without due process of law, and the right to the equal protection of the laws, secured by the

Fourteenth Amendment to the Constitution of the United States.

(d) 13th and 14th Amendments: *42 USC §1983; 1985(3)*.

WHEREFORE, Plaintiff demands judgment against the Defendants as follows:

(1) Compensatory, exemplary, and punitive damages on the first cause of action in the amount of $1,000,000.00.

(2) Compensatory, exemplary, and punitive damages on the second cause of action in the amount of $1,000,000.00.

(3) Attorney's fees and costs of this action.

(4) Stay of state courts proceedings pursuant to 28 USC §2283 against Martabanos and Bano Buick, Inc.; this is the residual branch of a State action against all the herein defendants. The Village of Mt. Kisco, Justice Cerbone, and the Mt. Kisco Police Department have extricated themselves from the State action on a technicality of defect in service of process.

(5) Such other and further relief as this Court may deem just and proper.

Dated: White Plains, New York
June 29, 1982.

Respectfully submitted,

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By Wayne P. Stix
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OPPOSITION

BRIEF

Office-Supreme Court, U.S.
FILED
JUL 15 1985
ALEXANDER L. STEVAS,
CLERK

NO. 84-1947

IN THE

Supreme Court of the United States

October Term 1985

VINCENT T. CERBONE,

Petitioner,

and

BANO BUICK, INC.,
ALFRED MARTABANO, and
ALFRED V. MARTABANO,

Co-Petitioners

-against-

LYNN H. CONWAY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR CERTIORARI

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

84-1947

VINCENT T. CERBONE,

Petitioner

and

BANO BUICK, INC.,
ALFRED MARTABANO, and
ALFRED V. MARTABANO,

Co-Petitioners

-against-

LYNN H. CONWAY,

Respondent.

****

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR CERTIORARI

****

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68 East Post Road
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(914) 949-7880

White Plains, New York
8 July, 1985

Preliminary Statement

This brief is submitted pro se in opposition to the petition for certiorari which seeks to overturn the two unanimous decisions herein by the United States Court of Appeals for the Second Circuit which reversed and remanded the United States District Court, Southern District of New York (Lowe, D.J.) dismissing a civil rights action.

Jurisdiction

Petitioner and co-petitioners (hereinafter "defendants") purport to invoke the jurisdiction of this Court under 28 USC sec. 1254 (1). (Defendants' brief at page 1.)

Counter-Statement Of Question Presented

Whether the insufficiency of the record below, precludes this court from exercizing its discretion to grant certiorari ?

Whether what is intelligible within the defendants' presentation stems solely from the eminent clarity of the concerned USCOA decisions ?

Statutory Provisions Involved

THe statutory and regulatory provisions involved are cited and set out in the appendix to the Defendants' brief at pages A-1 et seq.

Statement Of The Case

The statement of the case is as set forth in the controling USCOA, Second Circuit decisions; see Defendants' Appendix A-2 through A-18.

It should be added that shortly after the decision by the district court, my attorney suddenly ignored the case. He failed to follow the "civil appeal scheduling order" and told me that he had heard nothing as to the appeal. At that point, defendant Cerbone motioned for attorneys' fees. My attorney asked me to think about responding to that motion because he was going on vacation. In order to comply with his request, I went to his office and asked his secretary that I might see the file. In the file I

found full correspondence as to the civil appeal scheduling order--on or about the very day that the time therefor had expired. Thus I took over the case, made a motion to reinstate the appeal and a cross-motion in the district court against defendant Cerbone. The full state EBTs were included in that cross-motion which was also submitted to the USCOA as part of the motion to reinstate the appeal. I do not think that the defendants herein have been clear on that point of fact.

Argument

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

The decisions below were correct without regard to the questions sought to be raised in the petition.

The petition itself is convoluted, often proves too much, and attempts to fly in the face of every aspect of federal policy in civil rights litigation.

The frequently seen proposal of the defendants that their presentation commands this Court to exercise "summary reversal" is arrogant in the extreme. (E.g.: defendants' brief at page 22.)

What happened to this litigant could happen to any citizen, and will no doubt happen in the future, unless courts are

vigilant and do their job.

Defendants' success in the USDC was disgraceful. It appears now that the limitless resources of the defendants' insurance companies (aided by a computer research service) have been brought to bear on this latest effort.

This defendants' magnum opus smacks more of the often-parodied mediaeval philosophy debate or dark ritual of sacramentalisms. These things perditious to the judicial common sense upon which this nation rests.

Conclusion

The petition for a writ of certiorari should be denied, and if possible, the respondent should be awarded costs of this proceeding.

DATED: White Plains, New York
July 8, 1985

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REPLY

BRIEF

Supreme Court, U.S.
FILED
SEP 24 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1947 (3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

VINCENT T. CERBONE, as Justice of the Village Court, Village of Mt. Kisco, New York,

Petitioner,

—and—

BANO BUICK, INC., ALFRED MARTABANO, and ALFRED V. MARTABANO,

Co-Petitioners,

—against—

LYNN H. CONWAY, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF CERTIORARI

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New York, New York
24 September 1985

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Preliminary Statement

Petitioner, Justice Vincent T. Cerbone, as Justice of the Village Court, Village of Mt. Kisco, New York ("Cerbone"), [1] submits this brief in reply to the brief for respondent in opposition to certiorari, and in support of his petition for certiorari. Since plaintiff has appeared *pro se*, Cerbone suggests that the Court either allow her the opportunity to obtain counsel or else appoint counsel to represent her if the petition is granted.

---

[1] We note that plaintiff-respondent styles petitioner as simply "Vincent T. Cerbone". He was not so identified in the caption of her complaint in the district court, or in the Second Circuit caption prepared by plaintiff's counsel (in which he is not even identified as an appellee, see Al, A8). In the absence of a motion to amend the caption, Cerbone employs the caption which plaintiff chose.

POINT I

THE GRANTS OF CERTIORARI IN *DANIELS v. WILLIAMS*, #84-5872, 105 S. Ct. 1168 (1985), AND *DAVIDSON v. CANNON*, #84-6470, 105 S. Ct. 2673 (1985), DEMONSTRATE THAT QUESTIONS PRESENTED 1 THROUGH 4 SHOULD BE REVIEWED

In *Daniels v. Williams*, 105 S. Ct. 1168 (1985), this Court will be reviewing the en banc holding of the Fourth Circuit, 748 F.2d 229 (1984), that a prisoner who was injured by the negligence of a deputy sheriff in leaving a pillow on a staircase had no claim against the deputy under §1983. In *Davidson v. Cannon*, 105 S. Ct. 2673 (1985), this Court will review the en banc holding of the Third Circuit, 752 F.2d 817 (1984), that Davidson had no right of action under §1983 against his jailer for negligent failure to prevent an attack, notwithstanding that under New Jersey law Davidson had no remedy at all against the state or the warden.

Plainly these three cases raise interrelated issues of "when tortious conduct by state officials rises to the level of a constitutional tort". *Jackson v. Joliet* U.S. , 104 S. Ct. 1325 (1984) (White & Rehnquist, JJ., dissenting from the denial of certiorari). Indeed, the Fourth Circuit's opinion in *Daniels* proceeds exactly in the logical framework of Cerbone's petition here, in that it first examined whether Daniels was deprived of "liberty" within the meaning of the Fourteenth Amendment, and, if so, whether it was without due process, both of which questions it answered in the negative. This case presents both questions. First Cerbone challenges the Second Circuit's holding, A4,[3] that the allegations of "great humiliation, ridicule and mental anguish" made common law malicious prosecution into a constitutional tort. Questions Presented 1 and 2. He also challenges the Second Circuit's holding that the adequacy of

[3] Appendix to the joint petition for certiorari.

a state's tort remedy is irrelevant to the sufficiency of a due process complaint, relying on *Monroe v. Pape*, 365 U.S. 167 (1967), A4-A5. Questions Presented 3 and 4.

Cerbone's petition presents the mirror image of *Davidson v. O'Lone*, 752 F.2d 317 (3d. Cir. 1985) (en banc). While *Davidson* will require the Court to decide whether the lack of any tort remedy against the jailers under New Jersey law makes actionable under §1983 a negligent failure to prevent an attack, Judge Oakes' holding conversely presents the question whether a wholly adequate common law remedy precludes a parallel §1983 action for an intentional invasion of a liberty interest. Indeed, under the Second Circuit's formula, A25-A27, the §1983 action exactly duplicates the elements of New York's common law of malicious prosecution, a mode of analysis not employed by any other court. Whether a single ratio decidendi is broad enough to decide all three cases, as one would hope, can only be determined after plenary review.

POINT II

THE DIFFERENCES BETWEEN THE CASE AND *DANIELS* AND *DAVIDSON* COMPEL THE GRANT CERTIORARI HERE

Although the three cases are similar in that all three deal with liberty interests, this case has a broader potential application than either *Davidson* or *Daniels* which makes it the appropriate vehicle to answer some unsettled questions of §1983 actions.

First, this case involves intentional, not negligent, conduct. Despite *Ingraham v. Wright*, 430 U.S. 651 (1977), the lower courts are in conflict on the application of *Parratt v. Taylor*, 451 U.S. 527 (1981), to intentional torts involving liberty interests, relying on Justice Blackmun's concurrence, 451 U.S. at 545; *see* cases cited in petition at 15-16. Neither *Daniels* nor *Davidson* can resolve this important issue. Second, as the opinion below holds, A5, there is a recurring apprehension that *Parratt* is in tension with, if not conflict with, *Monroe v. Pape* in the intentional tort area. Although petitioners argued that *Paul v. Davis*, 474 U.S. 693, 700-01 (1976), and *Parratt v. Taylor*, 451 U.S. 527, 536, adequately answered this, the Second Circuit's opinion below shows the continuing need for this Court's guidance.

Third, this claim does not arise in prison, unlike *Hudson v. Palmer*, U.S. , 104 S. Ct. 194 (1984), *Parratt v. Taylor*, *Daniels* or *Davidson*. Because of the peculiar duties applicable only to jailers, *see* Restatement of Torts, Second, §320, the case law made exclusively in a prison context will be of doubtful applicability in the wider world. See *Daniels v. Williams*, *supra*, 748 F.2d 229, 231-32 (resting *Parratt* particularly on prison conditions).

CONCLUSION

For all the foregoing reasons as well as those put forth on the joint petition, a writ of certiorari should issue to review the judgments of the United States Court of Appeals for the Second Circuit.

Date: New York, New York
24 September 1985

Respectfully submitted,

BARRY, MCTIERNAN & MOORE
115 Broadway
New York, New York 10006
(212) 964-4270

By: _____
Michael F. Close
A Member of the Firm

JOINT

APPENDIX

No. 84-1947

Supreme Court, U.S.
FILED
APR 14 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

VINCENT T. CERBONE, as Justice of the Village Court, Village of Mt. Kisco, New York,

Petitioner,

—and—

BANO BUICK, INC., ALFRED MARTABANO, and ALFRED V. MARTABANO,

Co-Petitioners,

—against—

LYNN H. CONWAY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX
JA-I-JA-377

BARRY, MCTIERNAN & MOORE
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GEORGE J. CALCAGNINI
Attorney for Co-Petitioners Bano Buick, Inc., Alfred Martabano & Alfred V. Martabano
71 South Bedford Road
Mount Kisco, New York 10549
(914) 666-2722

New York, New York
11 April, 1986

Petition for Writ of Certiorari filed June 12, 1985
Petition for Writ of Certiorari granted January 27, 1986

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1. RELEVANT DOCKET ENTRIES IN THE COURTS BELOW:

United States District Court
Southern District of New York

Date	District Court No.	Description
12 July 1982	1	Filed complaint & Summons issued
10 Aug. 1982	3	Filed motion by defendants BANO to dismiss 12(b)(6)
18 Aug. 1982	4	Filed defendants Village and McKinsley's Answer
20 Aug. 1982	6	Filed defendant Cerbone's Answer and Counterclaim
23 Aug. 1982	7	Filed defendant Cerbone's Motion for judgment on the pleadings
31 Aug. 1982	10	Filed J.B. Henson's affidavit in support of #7
08 Sept. 1982	11	Filed defendants Villge of Mt. Kisco et ano's Motion for judgment on the pleadings
23 Sept. 1982	14	Filed plaintiff's affidavit opposing defendants' motion for summary judgment
23 Sept. 1982	15	Filed plaintiff's affidavit opposing Banos' motion to dismiss or for summary judgment

21 Jan. 1983	–	Filed memo end on copy #7... "Granted" Lowe, J.
21 Mar. 1983	20	Filed Memo Opinion & Order #54438 – Court grants defendants' motion; complaint dismissed in all respects
25 Mar. 1983	21	Filed Judgment – Ordered that the complaint is dismissed in all respects.
21 Apr. 1983	22	Filed plaintiff's Notice of Appeal from 3/14/83 Order
16 May 1983	23	Filed true copy of order from USCA that the appeal from 3/25/83 judgment of USDC, SDNY is dismissed
7 July 1983	24	Filed true copy of USCA Order that Notice of Motion for reinstantement of appeal is granted
10 Aug. 1983	25	Filed Cerbone's motion for order awarding costs and attorneys' fees
08 Sept. 1983	29	Filed copy of USCA order re judgment 3/25/83 dismissing appeal
12 Sept. 1983	31	Filed plaintiff's Affidavit in opposition to defendants Mt. Kisco & McKinsey's cross motion re fees.
22 Sept. 1983	32	Filed defendants BANO's Reply Affidavit to plaintiff's motion

04 Oct. 1983	33	Filed plaintiff's Answer to BANO's Affidavit
15 Feb. 1984	35	Filed defendants' affidavit in opposition to plaintiff's affidavit
2 Mar. 1984	36	Filed plaintiff's pro se reply affidavit

United States Court of Appeals
For the Second Circuit

26 Apr. 1983	Filed copy of district court docket entries and notice of appeal on behalf of appellant Lynn H. Conway
3 May 1983	Order dismissing the appeal (without judicial action) by clerk's order filed
20 June 1983	Appellant Conway motion for reinstatement of appeal
1 July 1983	Filed Order granted appellant Conway's motion for reinstatement of the appeal filed
13 July 1983	Scheduling Order #1, PC filed
31 Aug. 1983	Order dismissing appeal pursuant to CAMP for lack of prosecution filed.
12 Oct. 1983	Filed Appellant Conway's motion for reinstatement of appeal without prejudice
12 Oct. 1983	Filed Appellant Copnway's motion for dismissal of appeal without prejudice to renewal after cross motions
26 Oct. 1983	Received record on appeal
19 Dec. 1983	Filed record on appeal

13 Apr. 1984	Filed Order granting Conway's motion for reinstatement of appeal; Order denying Conway's motion for withdrawal without prejudice; Ordered that all future scheduling order shall be complied with in timely fashion or appeal will be dismissed
13 Apr. 1984	Filed order denying plaintiff's motion for order dismissing appeal
8 June 1984	Filed Conway's brief and appendix
3 July 1984	Filed BANO BUICK's brief
20 Aug. 1984	Filed plaintiff's reply brief
18 Oct. 1984	Case heard before Oakes, Winter CJJ
11 Dec. 1984	Filed Judgement affirmed in part, reversed and remanded
10 Jan. 1985	Filed Judge Cerbone's letter brief
23 Jan. 1985	Filed plaintiff's reply brief
15 Mar. 1985	Filed judgment reaffirmed and cause remanded with Cerbone as co-defendant
25 Apr. 1985	Filed Mandate issued (judgment 3/15/85 only)

Relevant Pleadings:

Complaint – (filed with certiorari petition)

Answer and Counterclaim of Vincent T. Cerbone

Other Relevant Entries:

Martabano Affidavits and Exhibits in Support of Motion to Dismiss

Lynn H. Conway ("Conway") Affidavit in Opposition 18 September 1982 (2 affidavits, with exhibits)

25 March 1983 – Judgement

Cerbone's Affidavit of 29 June 1983 with exhibits A through F

Conway's Affidavit of 1 September 1983 with exhibits A (Martabano depositions); B (Larry McKenzie deposition); and C (Conway depositions)

Conway's "Supplemental Affidavit" of 6 September 1983

Conway's Affidavit of 9 September 1983

Conway's Affidavit of 14 February 1984 (without exhibits)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

LYNN H. CONWAY,

Plaintiff,

– against –

THE VILLAGE OF MOUNT KISCO, NEW YORK; VINCENT CERBONE as Justice of the Village Court, Village of Mount Kisco, New York; DETECTIVE LARRY McKINSEY, Officer of the Village of Mount Kisco Police Department; BANO BUICK, INC.; ALFRED MARTABANO, individually and as officer of the Bano Buick, Inc.; and ALFRED V. MARTABANO, individually and as an officer of Bano Buick, Inc.,

Defendants.

----------x

82 Civ. 4521
(M.J.L.)

ANSWER

The defendant, Vincent Cerbone, Justice of the Village Court, Village of Mount Kisco, New York, sued herein as above in his official capacity, by his attorneys, Barry, McTiernan & Moore, answering, the complaint of the plaintiff sets forth as follows:

1. Admits the allegations of paragraphs 1, 2, 3, 4, 5, 6 and 9.

2. Denies *in toto* paragraphs 7, 8, 11, 13, 15, 21, 28 and 29.

3. Admits that on or about 30 June 1977 plaintiff was arrested for issuing a bad check and otherwise denies paragraphs 10 and 24.

4. Admits that upon the complaint made by Alfred V. Martabano a warrant was issued for the plaintiff's arrest and otherwise denies paragraph 12.

5. Admits that the warrant was executed and plaintiff taken into custody and otherwise denies paragraph 14.

6. Admits that prosecution of plaintiff continued until 20 September 1979 are that Cerbone did not dismiss the charges and otherwise denies paragraph 16.

7. Admits that a jury trial was not held and otherwise denies paragraph 17.

8. Admits that plaintiff's motion to dismiss was decided against plaintiff and otherwise denies paragraph 18.

9. Denies to have knowledge sufficient to form a belief as to paragraphs 19, 20, 23, 26 and 27.

10. Admits that plaintiff was arrested on 30 June 1977 and otherwise denies paragraph 25.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

11. That the defendant Village Justice is absolutely immune from this suit.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

12. That process was not validly served.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

13. That the action is barred for failure to serve a notice of claim.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

14. That the action is barred by the statute of limitations.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

15. That the action is barred by the collateral estoppel effect of the attached order dated 23 July 1982.

AS AND FOR A COUNTERCLAIM

16. That the action is frivolous and malicious and defendant Justice is entitled to his attorneys fees for defense under 42 U.S.C. §1988.

WHEREFORE, Vincent Cerbone, sued herein as Justice of the Village Court, Village of Mount Kisco, New York, demands judgment dismissing the complaint with costs, disbursements and attorneys fees in this action.

Dated: New York, New York
16 August 1982

BARRY, McTIERNAN & MOORE
Attorneys for Defendant
VINCENT CERBONE,
115 Broadway
New York, New York 10006
(212) 964-4270

/s/ Michael F. Close
Michael F. Close

SUPREME COURT — STATE OF NEW YORK
SPECIAL TERM, PART/ WESTCHESTER COUNTY

Present: I
HON. RICHARD J. DARONCO

----------x

LYNN H. CONWAY and JEFFREY M. CONWAY,

Plaintiffs,

— against —

BANO BUICK, INC.; ALFRED MARTABANO, SR., individually and as an officer of the BANO BUICK, INC.; ALFRED MARTABANO, JR., individually and as an officer of the BANO BUICK, INC.; THE VILLAGE OF MOUNT KISCO, NEW YORK; THE POLICE DEPARTMENT OF MOUNT KISCO, NEW YORK; and DETECTIVE McKINSEY,

Defendants.

----------x

Index Number 2455, 1980
Motion Date 4/20, 1982
Motion Cal. Number 41
Trial Cal. Number

The following papers numbered 1 to 23 read on this motion by defendants Village of Mount Kisco, New York and Detective McKinsey in an action for malicious prosecution and false arrest for summary judgment.

Upon the foregoing papers it is ordered that this moton is granted and this action is severed as to these defendants. Acts of the court and the police officer are judicial and quasi judicial in nature, and as such, they are immune from civil suit, however erroneous or wrong it may be, or however malicious even the

motive which produced it to the injury of the plaintiff (see *Shanbarger v. Kellogg*, 35 A.D. 2d 902, mot for lv to app den 29 N.Y. 2d 485, app dsmd 29 N.Y. 2d 649, cert den. 405 U.S. 919, 1 Carmody Wait 2d, §3.16).

WAYNE P. STIX, Atty. for Pltfs., 175 Main St., White Plains, New York 10601 J. BOYD HENSON, Atty. for Defts., Village of Mt. Kisco & McKinsey, 149 Grand St., White Plains, New York 10601

GERALD W. MATLIN, Atty. for Defts., Bano Buick, Alfred Martabano, Sr., and Alfred Martabano, Jr., 10 W. Hyatt Ave., Mt. Kisco, New York 10549

Dated 7/23/82 Entered 7/23/82 _____

J.S.C.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

(SAME CAPTION)

AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS

Civil Action No. 82 Civ. 4521
Judge Lowe

ALFRED MARTABANO, being duly sworn, deposes and says:

1. I am one of the defendants above named and am an officer of the defendant, BANO BUICK, INC. I am fully familiar with the facts hereinafter set forth and make this affidavit in support of the motion to dismiss this action as to myself and the defendants, BANO BUICK, INC. and ALFRED V. MARTABANO.

2. Copies of the summons and verified complaint herein were served on said defendants on or about July 26, 1982, by certified mail. No other copies of the summons and complaint were served on the said defendants by any other method. I am advised by my attorney, and based thereon, do believe that said method of service of process was insufficient as a matter of law under Rule 4(d) of the Rules of Civil Procedure and, therefore, this Court lacks jurisdiction over the person of the defendants, BANO BUICK, INC., ALFRED MARTABANO and ALFRED V. MARTABANO.

3. This is an action framed in terms of a claim under 42 USC §1983 which is actually an action for malicious prosecution and false arrest arising from the arrest of the plaintiff, LYNN H. CONWAY, on or about June 30, 1977, on the charge of Issuing a Bad Check, a Class B misdemeanor, in violation of Penal

Law §190.05 (McKinney's New York). A copy of the complaint herein is annexed hereto as Exhibit A and made a part hereof.

4. An action almost identical to the present action was commenced by the service of a summons and complaint on or about January 15, 1980, in the Supreme Court of the State of New York, County of Westchester, entitled LYNN H. CONWAY and JEFFREY M. CONWAY, Plaintiffs, against BANO BUICK, INC., ALFRED MARTABANO, SR., individually and as an officer of the BANO BUICK, INC., ALFRED MARTABANO, JR., individually and as an officer of the BANO BUICK, INC., THE VILLAGE OF MOUNT KISCO, NEW YORK, THE POLICE DEPARTMENT OF MOUNT KISCO, NEW YORK, AND DETECTIVE McKINSEY, Defendants (Index No. 2455/80). The said State Court action is still pending with respect to the defendants, BANO BUICK, INC., ALFRED MARTABANO, SR. and ALFRED MARTABANO, JR., though it has been dismissed as to the other defendants. Obviously, the parties in this action are the same as those initially in the State action, with the addition of the Honorable VINCENT CERBONE as Justice of the Mount Kisco Village Court. The proceeding in State Court is essentially a common law intentional tort action for malicious prosecution and false arrest arising from the aforementioned arrest of the defendant, LYNN H. CONWAY. However, it is also alleged in the complaint therein, a copy of which is annexed hereto as Exhibit B and made a part hereof, that the defendants, some of whom are public officials, acted under color of law pursuant to a conspiracy to deprive the plaintiff, LYNN H. CONWAY, of her liberty. I am advised by my attorney that if such allegations were proven at trial, they would entitle the plaintiff to recover based on 42 USC §1983, even though that provision of law is not expressly mentioned in the complaint.

My attorney further advises me that it is well settled law that State courts have concurrent jurisdiction with the Federal Courts over §1983 claims. Therefore, since the present action does not involve an exclusive federal question and there is no diversity of citizenship, this Court lacks jurisdiction over the subject matter of this action and over the person of the defendants.

5. The ultimate issue on the merits underlying both this action and the State Court action is whether or not there existed probable cause to have the plaintiff arrested for Issuing a Bad Check under Penal Law §190.05. Resolution of that issue is uniquely within the province of the New York State Courts, especially when the action in the State Court precedes the Federal Court action. I am advised by my attorney that in such a case, it would be improper and contrary to the comity of the courts and the absention doctrine and the precedents of Federal practice for this Court to assume jurisdiction and concurrently try the same subject matter.

6. As previously stated, the plaintiff was arrested on or about June 30, 1977. According to paragraph 17 of the complaint herein, the criminal charge was dismissed on September 20, 1979. However, that dismissal was not on the merits but rather, with the consent of the District Attorney, it was dismissed in the interest of justice due to the delay in prosecution.

7. Based on the foregoing, the statute of limitations on plaintiff's claim began to run either on June 30, 1977, the date of arrest, or on September 20, 1979.

8. This action was commenced on or about July 12, 1982, by the filing of a summons and complaint. Obviously, well over one year elapsed between the time the plaintiff's cause of action allegedly occurred and the commencement of this action.

9. I am advised by my attorney and based thereon, do believe that because a statute of limitations for §1983 or §1985 actions is not contained in the Civil Rights Act itself or elsewhere in the federal statute, the applicable period of limitation is that which New York State courts would enforce had an action seeking similar relief been brought in a court of that State. The New York State cause of action most similar to the present action is false imprisonment or malicious prosecution. Civil Practice Law and Rules §215 (McKinney's New York) provides that:

> The following actions shall be commenced within one year: . . .
>
> (3) an action to recover damages for . . . false imprisonment, malicious prosecution . . .

Obviously, this action is barred by the statute of limitations.

10. An examination of the facts relevant to this action indicates that the complaint fails to state a claim upon which relief can be granted. Those facts are as follows:

> (a) On or about April 15, 1977, the plaintiff brought her 1973 automobile to the place of business of the defendant, BANO BUICK, INC., to have certain repair work done to said vehicle. On May 10, 1977, after completion of the aforesaid repairs, the plaintiff issued a check, #154, to the defendant, BANO BUICK, INC., in the amount of $434.34, the cost of such repairs. A copy of said check is annexed hereto and made a part hereof as Exhibit C. The said check was then deposited into a bank account of the defendant, BANO BUICK, INC.
>
> (b) On or about April 18, 1977, (sic) the said check was returned to the defendant, BANO BUICK, INC., uncollected with a notice from the bank indicating that the plaintiff had insufficient funds in her account to cover the check. A copy of the said notice from the bank is annexed hereto and made a part hereof as Exhibit D.
>
> (c) Thereafter, defendant, BANO BUICK, INC., by its agents and employees, attempted to resolve the matter by contacting the plaintiff by telephone on May 31st, 1977, June 1st, 1977, June 3rd, 1977, June 6th, 1977, June 14th, 1977, June 20th, 1977 and June 21st, 1977. When each call was met with no success whatsoever, it became evident to the defendant that the

check was given in bad faith and the defendants, BANO BUICK, INC., ALFRED MARTABANO, SR. and ALFRED MARTABANO, JR., promptly discussed the matter with their attorney after making a full disclosure of the facts. Said defendants were advised by their attorney that under the circumstances, the issuance of said check constituted a violation of Penal Law §190.05-2. The said defendants thereafter, on advise of counsel, contacted the Police Department of the Village of Mount Kisco. None of the said defendants acted with any degree of malice, but only acted as directed by counsel.

(d) Thereafter, on or about June 30, 1977, the plaintiff was arrested and charged with Issuing a Bad Check in violation of Penal Law §190.05, which provides:

> A person is guilty of issuing a bad check when: . . .
>
> 2. (a) He passes a check knowing that the drawer thereof does not then have sufficient funds with the drawee to cover it, and (b) he intends or believes at the time the check is passed that payment will be refused by the drawee upon presentation, and (c) payment is refused by the drawee upon presentation.
>
> Issuing a bad check is a Class B misdemeanor.

Relevant to bad check cases is Penal Law §190.10(1), which provides:

> When the drawer of a check has insufficient funds with the drawee to cover it at the time of utterance, the subscribing drawer or representative drawer, as the case may be, is presumed to know of such insufficiency.

Based on the foregoing, probable cause clearly existed to have the plaintiff arrested and none of her civil rights were violated.

(e) Furthermore, during the discovery process in the aforementioned State Court action, information and documentation was disclosed proving that the plaintiff was actually guilty of the crime with which she was charged.

(i) The plaintiff's bank statement and other checks issued for the relevant period of time, copies of which are annexed hereto and made a part hereof as Exhibit E, show that the plaintiff did not have sufficient funds in her account to cover check #154 at the time it was issued. She admitted to an examination before trial in the State action that her checks were issued in numerical consecutive order and the dates on them confirm that fact. Thus check numbers 149 through 153 were issued prior to the issuance of check numbe 154, the one which gave rise to the criminal charge.

(ii) The bank statement shows that on May 10, 1977, check #149, for $50.00 was paid, reducing plaintiff's account to $441.37. Previous to that date, check #150 and #152 had been paid, and #153 had been issued. Those checks show clearly that at the time the plaintiff wrote her check #154, she was overdrawn on her own records, and that there were insufficient funds to pay check #154 on the date it was written and delivered to the defendant, BANO BUICK, INC.

(iii) So far as the intent of the plaintiff is concerned, the facts show that she issued a check for the repairs in order to get possession of the car, when her checkbook showed, and the bank statement showed, that she was overdrawn.

Thus, the plaintiff was guilty as charged.

11. I believe there is no genuine issue as to any material fact herein and that as a matter of law, the defendants, BANO BUICK, INC., ALFRED MARTABANO and ALFRED V. MARTABANO, are entitled to summary judgment dismissing the complaint herein.

12. No previous or other application has been made for the relief or order sought herein.

WHEREFORE, the defendants, BANO BUICK, INC., ALFRED MARTABANO and ALFRED V. MARTABANO, respectfully request the relief as specified in the foregoing Notice of Motion and Motion.

/s/ _____
Alfred Martabano

Sworn to before me this
6th day of August, 1982.

/s/ _____

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

(SAME CAPTION)

VERIFIED COMPLAINT

Index No.

Plaintiffs by and through their attorney, WAYNE P. STIX, complaining of the Defendants, allege as follows:

1. At all times relevant herein Plaintiffs were and still are residents of the County of Westchester and State of New York.

2. Upon information and belief and at all times relevant herein Alfred Martabano, Sr. was and still is a resident of the County of Westchester and State of New York and is an officer of Bano Buick, Inc., Main Street, Mt. Kisco, New York.

3. Upon information and belief and at all times relevant herein Alfred Martabano, Jr. was and still is a resident of the County of Westchester and State of New York and is an officer of Bano Buick, Inc., Main Street, Mt. Kisco, New York.

4. Upon information and belief and at all times relevant herein Bano Buick, Inc. was and still is a duly organized and existing New York Corporation chartered under the Business Corporation Law of the State of New York and maintains a place of business at 193 Main Street, Mt. Kisco, New York.

5. Upon information and belief and at all times relevant herein the Village of Mt. Kisco was and still is a municipal corporation organized and incorporated under the laws of the State of New York.

6. On or about October 2, 1979, a notice of claim against the Defendant Village of Mount Kisco was duly served upon the Defendant pursuant to Section 50-E of the General Municipal Law of the State of New York.

7. That more than 90 days but less than one year has elapsed since the service of said notice of claim.

8. That every provision of Section 50-E of the General Municipal Law of the State of New York has been complied with.

9. Heretofore and on or about the 29th day of June, 1977, the Defendant maliciously and without reasonable or probable cause therefore appeared before the local Village Judge of the Village of Mt. Kisco and charged Plaintiff, Lynn Conway, of the crime of issuing a bad check in violation of *Section 190.05-2* of the *Penal Law of the State of New York*. Said violation is a misdemeanor crime.

10. Thereupon and on or about June 30, 1977, Defendants, Alfred Martabano, Sr. and Alfred Martabano, Jr., each individually and as an officer of Bano Buick, Inc., procured and caused a warrant for the arrest of Plaintiff to be issued by the Acting Village Justice.

11. Thereafter and on or about the 30th day of June, 1977, at approximately 7:OO P.M., the Plaintiff, Lynn Conway, was arrested under the said warrant and was taken in custody to the Mt. Kisco Village Jail and there imprisoned and detained for a period of seven hours, and arraigned before the Judge on the charges of the misdemeanor complaint.

12. Prior thereto and on or about the 28th day of June, 1977, at 11:00 P.M. the Plaintiffs Lynn Conway and Jeffrey Conway, received a call from Village of Mt. Kisco Detective McKinsey who under color of Law threatened to arrest the Plaintiff, Lynn Conway, unless she paid the sum of Four Hundred, Thirty-one Dollars and Thirty-four Cents ($431.34) to Alfred Martabano, Sr./Jr., and/or Bano Buick, Inc.

13. At the time of the above said telephone conversation between Plaintiff Lynn Conway and Detective McKinsey, no accusatory instrument, misdemeanor complaint, or arrest warrant had been issued and McKinsey had no lawful right to make said call a demand.

14. At all times herein the Village of Mt. Kisco Police Department was acting maliciously, wrongfully, illegally, without probable cause, and in a fashion constituting abusive process and malicious prosecution in that it aided and abetted the other defendants in perverting the law by bringing and/or threatening to lodge a criminal complaint against the Plaintiff, Lynn Conway, for the sole purpose to settle a civil debt.

15. On or about June 29, 1977, and on several occasions thereafter as a direct result of the above facts, the Plaintiffs were forced and compelled to appear at the Justice Court in Mt. Kisco in order to defend, appear, and answer the criminal charge.

16. On several occasions both in writing and orally the Plaintiffs through their attorney demanded a trial on the issues.

17. The criminal action against the Plaintiff, Lynn Conway, was dismissed in the interest of justice by the Westchester County District Attorney's Office.

AS AND FOR A FIRST CAUSE OF ACTION

18. Plaintiffs repeat and reiterate each and every Paragraph of this complaint denoted "1" through "17" herein as though fully set further herein.

19. Defendant, Alfred Martabano, Sr., and Defendant Alfred Martabano, Jr., caused said complaint and warrant to issue in both their personal and corporate capacities knowing that Plaintiff had violated no section of the Penal Law.

20. Alfred Martabano, Sr., and Alfred Martabano, Jr., knowingly, intelligently, wrongfully, and maliciously caused said complaint and warrant to harass, scare, frighten, terrify, humiliate and embarrass Plaintiff to settle a civil, business debt.

21. Defendants, Alfred Martabano, Sr., and Alfred Martabano, Jr., issued and caused to issue a misdemeanor complaint and warrant for the arrest of Plaintiff, Lynn Conway, without any basis for doing so.

22. Defendants, Alfred Martabano, Sr. and Alfred Martabano, Jr., knew or should have known that said criminal prosecution was without foundation or justifiable cause.

23. As a result of the above, the Plaintiff, Lynn Conway, has been harassed, humiliated, scared, frightened, abused, arrested with color of law and thereby caused to suffer in the amount of One Million ($1,000,000.00) Dollars.

AS AND FOR A SECOND CAUSE OF ACTION

24. Plaintiffs repeat and reiterate each and every allegation contained in the complaint denoted Paragraphs "1" through "23" as if set forth fully herein.

25. As a result of the above, Plaintiff Lynn Conway, has become nervous, anxious, terrified, and unable to perform and discharge her wifely duties.

26. As a result of the above, the Plaintiff, Jeffrey Conway, the lawful and legal husband of Plaintiff, Lynn Conway, has been denied the consortium, services, and companionship of his wife, Lynn Conway, all to his damage in the amount of One Hundred Thousand ($100,000.00) Dollars.

AS AND FOR A THIRD CAUSE OF ACTION

27. Plaintiffs repeat and reiterate each and every allegation contained in Paragraphs denoted "1" through "26" as if fully set forth herein.

28. Defendant, Village of Mt. Kisco, by and through its agent, employees, maliciously, wrongfully and under color of law, and without just cause or reason aided and abetted Defendants, Alfred Martabano, Sr., Alfred Martabano, Jr., and Bano Buick, Inc., in the perversion of legal process in that Officer McKinsey and other agents and/or employees of the Village of Mt. Kisco, through his/and their position as Police Officers threatened, coerced and directed Plaintiff, Lynn Conway, under threat of arrest and legal process to pay a civil debt owing to Defendant, Alfred Martabano, Sr., Alfred Martabano, Jr., and Bano Buick, Inc. and threatened Plaintiff, Lynn Conway, that if she failed to pay said debt, a criminal complaint would be issued against her and she would be arrested.

29. On and between June 29 and June 30, 1977, the Village of Mt. Kisco through its police power did issue a criminal information against Lynn Conway and caused her to be arrested.

30. As a result of the above abuse of power and malicious prosecution by the Defendant, Village of Mt. Kisco, the Plaintiff was injured to the extent of One Million ($1,000,000.00) Dollars.

AS AND FOR A FOURTH CAUSE OF ACTION

31. Plaintiffs repeat and reiterate each and every allegation contained in Paragraphs denoted "1" through "30" as if fully set forth herein.

32. Bano Buick, Inc. by and through its agents, servants and/or employees, Alfred Martabano, Sr. and Alfred Martabano, Jr., did maliciously prosecute Plaintiff, Lynn Conway, by causing a criminal action against her to be commenced and causing her arrest for the sole purpose of collecting a business debt.

33. At all times herein the Defendant, Bano Buick, Inc., knew that there was not probable cause to issue said criminal information and did so solely to frighten, scare, coerce, harass, terrify, humiliate and embarrass Plaintiff under threat of criminal prosecution in payment of a debt.

34. As a result of the above, Plaintiff, Lynn Conway, was frightened, terrori[illegible] miliated, embarrassed, and otherwise injured in the amount of One Million ($1,000,000.00) Dollars.

AS AND FOR A FIFTH CAUSE OF ACTION

35. Plaintiffs repeat and reiterate each and every allegation contained in Paragraphs of the Complaint denoted "1" through "34" as if fully set forth herein.

36. The Defendants Village of Mount Kisco, Police Department of Mount Kisco, and Detective McKinsey, on or about the 29th day of June, 1977, did at the Plaintiffs' residence in North Salem, New York, maliciously, and with intent to injure the Plaintiffs, by force and against Plaintiff's will did compel Plaintiff to go with them to the Mount Kisco Police Office or headquarters, situate in the said city of Mount Kisco, and there imprisoned the Plaintiff, Lynn Conway, and then and there detained her, restrained of her liberty for the space of several hours, without reasonable cause, and without any right or authority so to do, and against the will of the Plaintiff; whereby the Plaintiff was not only bruised and wounded, but was also subjected to great humiliation and ridicule and was injured in her credit, and was prevented from attending to her necessary affairs during that time, to her damage in the sum of One Million ($1,000,000.00) Dollars.

AS AND FOR A SIXTH CAUSE OF ACTION

37. Plaintiffs repeat and reiterate each and every allegation contained in Paragraphs of the Complaint denoted "1" through "36" as if fully set forth herein.

38. When Plaintiff was arrested as aforesaid, she informed Defendant that she, the Plaintiff, had committed no crime or offense and offered to prove the same, but Defendant refused to pay any attention to what the Plaintiff said and forcefully, violently, wantonly, and maliciously handcuffed her, all in the

presence of a large number of by-standers, and thereafter compelled the Plaintiff to enter a police vehicle used for the transportation of criminals and compelled her to submit to a search of her person, and confined her to the Mount Kisco Police Station for several hours.

39. By reason of these premises, the Plaintiff has been injured in the amount of $1,000,000.00 (One Million Dollars).

WHEREFORE, Plaintiffs demand judgment against the Defendants as follows: $1,000,000.00 in the First Cause of Action; $100,000.00 in the Second Cause of Action; $1,000,000.00 in the Third Cause of Action; $1,000,000.00 in the Fourth Cause of Action; $1,000,000.00 in the Fifth Cause of Action; and $1,000,000.00 in the Sixth Cause of Action; with interest from June 28, 1977, together with the costs and disbursements of this action.

Dated: White Plains, New York
January 9, 1980

WAYNE P. STIX, ESQ.
Attorney for Plaintiffs
Office and P.O. Address:
175 Main Street
White Plains, New York 10601
(914) 761-8791

22 8400 4

LYNN H. OR JEFFR. M. CONWAY

154

5/10 19 77 17033 2260

ay to the der of BANO BUICK, INC. $ 431.34

FOUR HUNDRED Thirty-one 34/100 Dollars

Dry Dock Savings Bank

NEW YORK, NEW YORK 10017

FOR ENGINE!

:2260-7033: 022840068 0154 :000043134

Lynn H. Conway

JA-26

BANKERS TRUST COMPANY
NEW YORK

Date 5/18/77

We CHARGE your account and return herewith the following unpaid item:

Date	Maker:	Reason:	Drawn on:	Amount of Item
5/10/77	Lynn H. or Jeffrey M. Conway	Insufficient	Dry Dock Sav.	$431.34

44 011 254

Acct. No.

POSTAGE AND EXPENSE	1.25
Amount of Debit	$431.34

Bano Buick, Inc.
193 Main Street
Mt. Kisco, New York 10549

Plf's #12 for Id.
3/3/81
S.K.

091 OFFICE

32262 200/Pkg.

JA-27

DRY DOCK SAVINGS BANK
60 EAST 42ND STREET
NEW YORK CITY, NEW YORK 10017

212
644-6000

I 22 840018 4 | AS OF DATE 05/20/77 | PAGE 1

OTHER ACCOUNTS

ACCOUNT NUMBER	TYPE	BALANCE

JEFFREY M. CONWAY
LYNN M. CONWAY
LAKEVIEW DRIVE PO BOX 84
NORTH SALEM, NY 10560

ACTIVITY ON THIS STATEMENT

DEPOSITS	CHECKS
5	21

JA-28

BALANCE ON PREVIOUS STATEMENT	+ DEPOSITS AND OTHER CREDITS	- WITHDRAWALS	= BALANCE AS OF DATE
423.72	2,852.97	2,726.95	749.74

DATE	DESCRIPTION	LOAN ACTIVITY	DEPOSITS	WITHDRAWALS	BALANCE
04/15	CHECK PAID- 126			30.00	593.72
04/15	CHECK PAID- 135			36.40	557.32
04/19	DEPOSIT		360.00		917.32
04/20	CHECK PAID- 137			9.44	907.88
04/20	CHECK PAID- 138			106.72	801.16
04/22	DEPOSIT		900.00		1,701.16
04/22	CHECK PAID- 142			49.94	1,651.22
04/23	CHECK PAID- 133			40.00	1,611.22
04/23	CHECK PAID- 139			61.53	1,549.69
04/23	CHECK PAID- 140			6.85	1,542.84
04/23	CHECK PAID- 143			900.00	642.84
04/24	CHECK PAID- 141			4.89	637.95
04/24	DEPOSIT		586.00		1,223.95
04/27	CHECK PAID- 145			13.19	1,210.76
04/28	CHECK PAID- 147			495.67	715.09
04/30	CHECK PAID- 48			272.78	442.31
05/03	CHECK PAID- 144			28.70	413.61
05/03	DEPOSIT		320.00		733.61
05/05	CHECK PAID- 146			100.00	633.61
05/06	CHECK PAID- 152			100.00	533.61
05/07	CHECK PAID- 150			42.24	491.37
05/10	CHECK PAID- 149			50.00	441.37
05/12	CHECK PAID- 153			49.60	391.77
05/13	CHECK PAID- 151			30.00	361.77
05/17	DEPOSIT		686.97		1,048.74

DEFENDANT'S EXHIBIT A
FOR IDENTIFICATION
5-25-84
(2 pages
plus
envelope)

A LOAN ADVANCE

SUMMARY OF LOAN ACTIVITY

P LOAN PAYMENT

BEST AVAILABLE COPY

DRY DOCK SAVINGS BANK
60 EAST 42ND STREET
NEW YORK CITY, NEW YORK 10017

212
644-6000

1 22 840018 4 05/20/77 2

OTHER ACCOUNTS

ACCOUNT NUMBER	TYPE	BALANCE

JEFFREY M. CONWAY
LYNN M. CONWAY
LAKEVIEW DRIVE PO BOX 84
NORTH SALEM, NY 10560

ACTIVITY ON THIS STATEMENT

JA-29

PREVIOUS BALANCE ON PREVIOUS STATEMENT	+	DEPOSITS AND OTHER CREDITS	−	WITHDRAWALS AND FEES	=	BALANCE AS OF THIS STATEMENT DATE

DATE	DESCRIPTION	LOAN ACTIVITY	DEPOSITS	WITHDRAWALS	BALANCE
05/19	CHECK PAID- 155			299.00	749.7

FOR NEW FURNITURE, HOUSEHOLD REPAIRS
OR ANY HOME IMPROVEMENT, CALL US FOR
A LOAN --- (212) 644-6076.

A LOAN ADVANCE

SUMMARY OF LOAN ACTIVITY

P = LOAN PAYMENT

BEST AVAILABLE COPY

22 840018 4
LYNN H. OR JEFFREY M. CONWAY

149

5/2 19 77

I-70333
2260

Pay to the order of Resnick T Neuman $ 50.00

Fifty 00/100 Dollars

Dry Dock Savings Bank
NEW YORK, NEW YORK 10017

Memo 1976 return

Lynn H. Conway

⑆ 2260 ⑆ 70331 ⑆ 022840018 ⑈ 0149 ⑈ 000000 5000 ⑈

22 840018 4
LYNN H. OR JEFFREY M. CONWAY

150

5/2 19 77

I-70333
2260

Pay to the order of [illegible] $ 42.24

[illegible] 24/100 Dollars

Dry Dock Savings Bank
NEW YORK, [illegible]

Memo 669-[illegible]

Lynn H. Conway

⑆ 2260 ⑆ 70331 ⑆ 022840018 ⑈ 0150 ⑈ 000000 4224 ⑈

BEST AVAILABLE COPY

22 840018 4
LYNN H. OR JEFFREY M. CONWAY

151

5/2 19 77

1-7033
2260

Pay to the order of Bloomingdales $ 30.00
Thirty 00/100 Dollars

Dry Dock Savings Bank
NEW YORK, NEW YORK 10017

7708238

Memo 48007017

Lynn H. Conway

⑆2260⑈7033⑆ 022840018 ⑈0151 "000003000"

22 840018 4
LYNN H. OR JEFFREY M. CONWAY
CLARK

152

5/2 19 77

1-7033
2260

Pay to the order of Lakeland Men's Furnishings $ 100.00
One hundred 00/100 Dollars

Dry Dock Savings Bank
NEW YORK, NEW YORK 10017

Memo OK acct.

Lynn H. Conway

⑆2260⑈7033⑆ 022840018 ⑈0152 "00000 10000"

BEST AVAILABLE COPY

22 840018 4
LYNN H. OR JEFFREY M. CONWAY

153

4/7 19 77 1-7033 2260

Pay to the order of Lakeland Lumber $ 49.60

Forty-nine 60/100 Dollars

Dry Dock Savings Bank
NEW YORK, NEW YORK 10017

Memo

Lynn H. Conway

⑆2260⑈7033⑆ 022840018 4" 0153 ⑈00000496⑀0⑈

22 840018 4
LYNN H. OR JEFFREY M. CONWAY

155

5/12 19 77 1-7033 2260

Pay to the order of AETNA CASUALTY $ 299.00

TWO HUNDRED NINETY-NINE 00/100 Dollars

Dry Dock Savings Bank
NEW YORK, NEW YORK 10017

Memo AUTO 3/19-9/19

Lynn H. Conway

⑆2260⑈7033⑆ 022840018 4" 0155 ⑈00002990⑀0⑈

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

(SAME CAPTION)

AFFIDAVIT IN OPPOSITION TO DEFENDANTS' (BANO BUICK, ALFRED MARTABANO, ALFRED V. MARTABANO) MOTION TO DISMISS/OR SUMMARY JUDGMENT

Civil Action No. 82 Div. 4521 (M.J.L)

LYNN H. CONWAY being duly sworn deposes says:

1. I am the Plaintiff in the above-captioned action and pursuant to Rule 9(b) and 9(c) (2) of the General Rules of the Southern District of New York submit this Affidavit in Opposition to Defendants' (Bano Buick, Alfred Martabano, and Alfred V. Martabano) motion to dismiss or in the alternative for summary judgment as dated August 6, 1982, which is based upon the Affidavit of Alfred Martabano sworn August 6, 1982.

2. The first cause for the advocated dismissal is Defendants' assertion that no lawful process has been made upon them (Martabano Affidavit paragraph 2). This is incorrect. The moving Defendants were served by the U.S. Marshal for the Southern District of New York on July 14, 1982, pursuant to Rule 4 FRCP. Copies of the process receipt and return are attached hereto and made a part hereof as Exhibits "A-1", "A-2", and "A-3".

3. The second point advocating dismissal is that the Court lacks jurisdiction over the subject matter of this action and over the persons of the Defendants because the State courts have jurisdiction concurrent with the Federal courts over 1983 claims; moreover, Defendants here assert incorrectly that said State court action is a §1983 claim.

4. The subject matter of this action is proper for federal jurisdiction. The Complaint raises federal questions. It is clear pursuant to 28 USC § 1441 (b) that Federal courts original jurisdiction founded on a claim or right arising under the Constitution, treaties, or laws of the United States and that such actions "shall be removeable without regard to the citizenship or residence of the parties" ' see also 28 USC §1331, 1343.

5. In relation to the foregoing, Defendants raise the abstention doctrine. This is without merit in view of the congressional intent that civil rights be protected and that violations of civil rights be redressable. It must be borne in mind that Defendant Village of Mount Kisco has extricated itself from the State action by decision of the New York State Supreme Court, Appellate Division, Second Department. There the court found a defect in the service of the notice of claim under §50 (e) and (i) of the General Municipal Law. The court employed a strict interpretation of CPLR 311 (6) when it reversed the Trial Court deciding that there was no compliance with G.M.L. §50 (e) subdivision 3 paragaph (c). A copy of the Order of the Appellate Division is hereunto annexed as Exhibit "B". No appeal was taken on this matter in view of the scant likelihood of success in the New York Court of Appeals.

6. The Plaintiff is, therefore, without a State Court remedy against the Village of Mt. Kisco, and the State Court action against these Defendants is now impossible because the municipal Defendants, now excused, are necessary parties to any State action. Nevertheless, the Plaintiff is entitled by statute to seek remedies under §1983 and 1985 (3). Abstention would surely deny the Plaintiff an opportunity to redress injury done to her civil rights by the Village of Mt. Kisco and the moving Defendants because of the dismissal against the Village and its employees. These federal statutes are designed to augment other non-federal remedies. This is especially important in view of the fact that the State Court action was dismissed against the municipality due to service problems, not on the merits.

7. In *Pauk vs. The Board of Trustees of the City University of New York*, 654 F 2d 836, the Court was specifically addressing itself to the applicability of state imposed statutes of limitations on federal civil rights actions generally and the New York General Municipal Law §50 (i) and §50(k) specifically. The Court specifically reiterated its prior rejection of §50(i) as announced in *Taylor vs. Mayone*, 626 F 2d 247, 253, and *Quinn vs. Syracuse Model Neighborhood Corp.*, 613 F 2d 438, 449.

8. Moreover, it is clear from the decision of the Appellate Division that the federal constitutional rights here were not considered; see Exhibit "B", supra. It is well settled that:

> . . . it has been held that the civil rights acts (42 U.S.C. §1983 and 28 U.S.C. §1343) are "Acts of Congress" which "authorize" a court of the United States to stay proceedings in a State court. See, for example, *Dombrowski vs. Pfister*, 380 U.S. 479, 85 S. Ct. 1116, 14 L. Ed. 2d 22 (1964); *Baines vs. City of Danville*, 337 F. 2d 579 (4th Cir. 1964); and the discussion in Footnote 4 of *Studebaker Corp. vs. Gittlin*, 360 F. 2d 692, at 697.

O'Sullivan vs. Mundt 308 F. Supp. 1090 (1969), 1093 (Lasker, J.).

9. Defendants' assertion (paragraph 9) with respect to statute of limitations in a federal §1983 action being one year in the State of New York is incorrect. The statute of limitations for this action is three (3) years, *Pauk vs. Board of Trustees of City University of New York*, 654 F 2d 856 (1981), 866.

10. Further the claims in this action are most serious constitutional tourts, not those common law torts within the State Court action. *Pauk*, supra 862.

11. Defendants' paragraph 10 pages 4-7 sounds for summary judgment but constitute misstatement of fact and law. What is relevant is Westchester County Law §700 (1) and *People vs. Van Sickle*, 13 NY 2d 61, and *People vs. Miller*, Supreme Court, Appellate Term Division attached as Exhibit "C" which require that

crimes (such as "bad checks") must be prosecuted through the office of the Westchester County District Attorney which was bypassed in the prosecution of your deponent, but which ultimately took jurisdiction and dismissed the criminal complaint. The repair work alleged at paragraph 10 (a) was in explicit violation of the agreement Plaintiff had with Defendants who threatened and intimidated Plaintiff into giving over a check at 6:30 p.m. Defendants threatened to remove the repair and impose additional charges. Defendants do not inform this Court that they were in possession of a stop-payment notice from the bank prior to instigating a private criminal complaint. A copy of the "stop-payment notice" is hereunto annexed as Exhibit "D". Nor do Defendants inform this Court that the bank initially returned the check they exhibit as "C" as "insufficient funds" *in error*. Moreover, Defendants' Exhibit "C" fails to reveal the reverse of the check which shows more clearly the "stop payment" disposition by the bank. Despite Defendants' intentional neglect, a careful study of the face of the check does show the word "stop". Defendants are misleading this court. A copy of the bank's admission of error and "stop payment" record dated May 11, 1977, is hereunto annexed as Exhibit "D". Defendants do not inform this court that the attorney for their enterprises is their cousin Justice Vincent Cerbone, the Town Justice. Justice Cerbone advised them not only to bring the action, but also to conceal the fact that the bank had not intended to reject the check for insufficient funds. Finally Defendants neglect the fact that they commenced and proceeded *pro se* in their prosecution of the criminal complaint against your deponent. Attached as Exhibit "E" are pages 32-35 of the examination before trial transcript of Alfred Martabano taken on March 3, 1981, and pages 55-58 of the transcript of Alfred V. Martabano taken on March 3, 1981.

12. I have never bounced a check in my entire life. It was the custom and practice of Dry Dock Savings Bank to honor my checks even when the balance did not cover the amount being drawn. However, in this case, I had sufficient funds to cover the check when drawn and had I not stopped payment on this check, I would have made the deposit the morning following the day written. The facts cited by Alfred Martabano in his moving papers

are inaccurate and contrary to prior statements made by Mr. Martabano. I will not at this point set forth all the facts and circumstances leading to this litigation. Mr. Martabano apparently totally does not understand that the basis of my current proceeding is to recover money damages for injuries sustained by Defendants' violation of my constitutional rights for their conspiracy to use the local court's power and authority and police power of the municipality to collect an alleged civil debt which was not due. I was never found guilty of the criminal charge which was dismissed and I complain here only of the conspiracy between Martabano, other private Defendants, and the municipality and its employees.

13. Summary judgment, therefore, is improper.

WHEREFORE, Deponent respectfully requests that the Defendants' motion be, in all respects, denied.

LYNN H. CONWAY

CONWAY, res, v. BANO BUICK, INC., def; VILLAGE OF MOUNT KISCO, N.Y., ap—In an action to recover damages, inter alia, for false arrest, the appeal is from an order of the Supreme Court, Westchester County (Dickinson, J.), entered April 1, 1981, which, inter alia, denied defendant Village of Mount Kisco's motion to dismiss the complaint. Order reversed, on the law, without costs of disbursements and motion by appellant to dismiss the complaint as to it is granted.

The traverse hearing revealed no evidence that the village mayor, clerk or trustee (see CPLR 311, subd. 6) "actually received" the notice of claim that was incorrectly served upon an administrative aide to the director of the federally funded Office of Community Development (General Municipal Law, sec. 50-e, subd 3, par [c]). There was, therefore, noncompliance with section 50-e of the General Municipal Law.

CAL. NO. 188

THE PEOPLE OF THE STATE OF NEW YORK,

Appellant,

v.

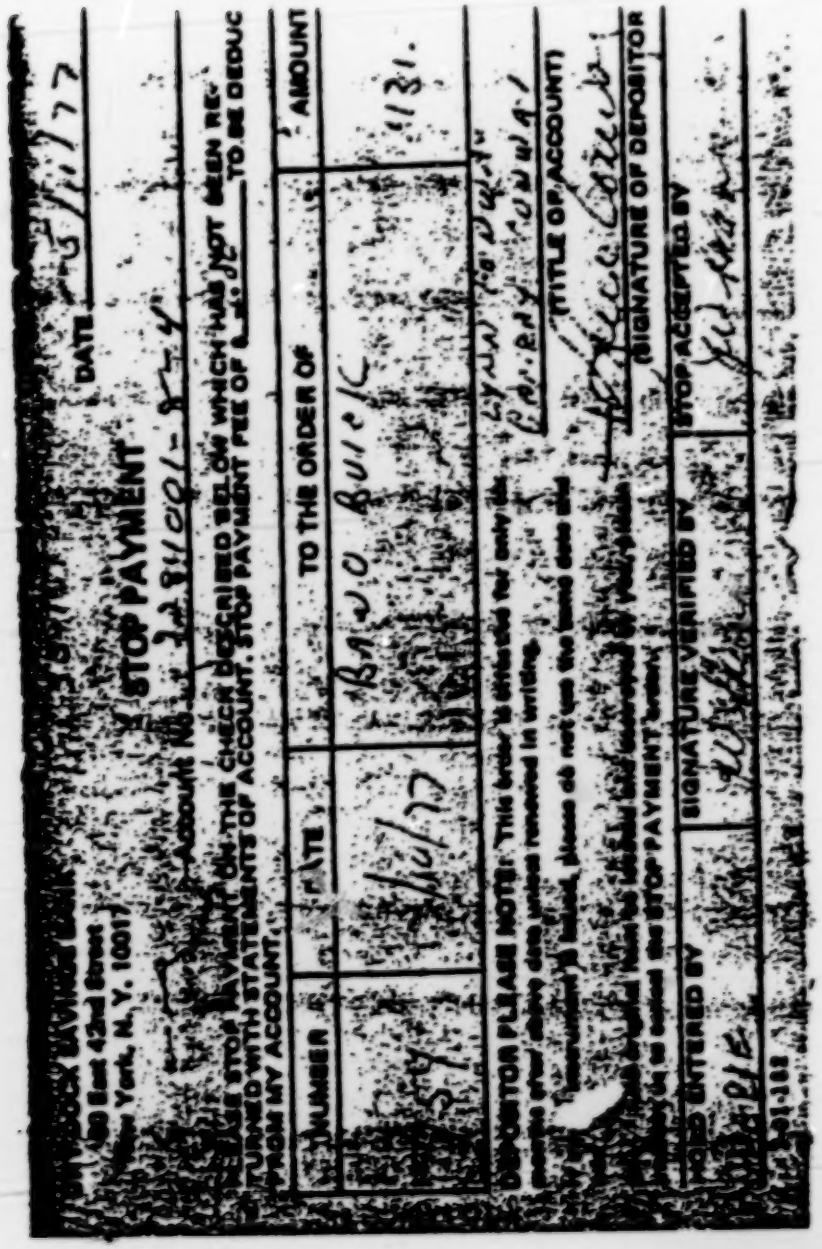
RICHARD MILLER,

Respondent

Appeal from order dismissed.

Since the district attorney opposes the prosecution of this appeal, by complainant's private attorney, it must be dismissed. However, the order of the court below dismissing the informations lodged against the defendant was proper in any event, since the district attorney cannot be said to have consented to this prosecution County Law §700, People v. *Van Sickle*, 13 N.Y. 2d 61

All concur.


DRY DOCK SAVINGS BANK
STOP PAYMENT
DATE
TO THE ORDER OF
AMOUNT
ACCOUNT NO.
TITLE OF ACCOUNT
SIGNATURE OF DEPOSITOR
STOP ACCEPTED BY
SIGNATURE VERIFIED BY
NUMBER
DATE
PAID ENTERED BY

DRY DOCK SAVINGS BANK

33 MAMARONECK AVENUE · WHITE PLAINS, N.Y. 10601 (914) 948-5400

CHARTERED 1848

JOSEPH W. SHANE
ASSISTANT VICE PRESIDENT

Mr. Jeffrey Conway
Lakeview Dr.
P.O. Box 84
North Salem, N.Y. 10560

Dear Mr. Conway;

On 5/25/77 we sent to you an advice indicating that a check you issued to Bano Buick Inc. was returned for insufficient funds.

The advice should have been marked Payment Stopped.

Very truly yours,

Joseph W. Shane
Assistant Vice President

BEST AVAILABLE COPY

Exhibit E to Conway Affidavit -
Pages 32-35 of EBT of Alfred Martabano and Pages 55-58 of EBT of Alfred V. Martabano (Reproduced Herein at Pages JA-104 to JA-108 and JA-124 to JA-127 respectively)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(SAME CAPTION)

AFFIDAVIT IN OPPOSITION

82 Civ. 4521 (M.J.L.)

LYNN H. CONWAY deposes and says:

1. I am the Plaintiff in the above-captioned action and make this Affidavit pursuant to Rule 9 (b) and 9 (c) (2) of the General Rules of the Southern District of New York with the advice of my attorneys, Cherico and Stix, in opposition to:

(a) Motions by Defendants Village of Mt. Kisco, New York, and Detective Larry McKinsey for summary judgment pursuant to F.R.C.P. 12 (c); and

(b) Motion by Justice Vincent Cerbone for summary judgment pursuant to F.R.C.P. 12 (c).

2. My attorney is submitting herewith a Memorandum of Law answering this motion.

3. The motion by Defendant Vincent Cerbone for summary judgment based on a judicial immunity is contrary to the facts. The Supreme Court in *Owen vs. City of Independence, Missouri*, 100 S.Ct. 1398, held that a muncipality and its employees have no immunity from liability under the Civil Rights Act flowing from its constitutional violations. The Civil Rights Act under which I am suing, by its terms, creates a species of tort liability that on its face admits of no immunity. As the Supreme Court in *Owen* held:

Its language is absolute and unqualified, and no mention is made of any privileges, immunities, or defenses that may be asserted; rather, it imposes liability upon "every person, including municipal corporations, who, under color of State law or custom, subjects, or causes to be subjected, any citizen of the Unites States...to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws."

The Court in the same case ruled that "where an immunity was well-established a common law at the time the Civil Rights Act was enacted and where its rationale was compatible with the purposes of the Act, the Act has been construed to incorporate that immunity; but there is no tradition of immunity from municipal corporations, and neither history nor policy supports a construction of the Act that would justify a grant of unqualified immunity to a city. A municipality has no immunity from liability under the Civil Rights Act flowing from its constitutional violations and may not assert its good faith of its officers as a defense to such liability."

5. The presence or absence of good faith is irrelevant and since the municipality's "governmental" immunity is abrogated by the sovereign's enactment of the statute such as the Civil Rights Act makes it amenable to lawsuits of this type under §1981 and §1983.

6. The Supreme Court also cited *Sterling vs. Constatin* 287 U.S. 378, 398:

> The common law doctine merely prevented the courts from substituting their own judgment on matters within the lawful discretion of the municipality. but a municipality has no "discretion" to violate the Federal Constitution; its dictates are absolute and imperative. And when a Court passes judgment on the municipality's conduct in §1983 action, it does not seek to second-guess the "reasonableness" of the City decision nor to

> interfere with the local government's resolution of competing policy consideration. Rather, it looks only to whether the municipality has conformed to the requirement of the Federal Constitution and statutes. When there is a substantial showing that the exertion of State power has overridden private rights secured by that Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceedings directed against the individuals charged with the transgression.

7. Citing *Monroe vs. Pape*, 365 U.S. 167, the Court held that:

> The central aim of the Civil Rights Act was to provide protection to those persons wronged by the "(m)isuse of power, possessed by virtue of State law and made possible only because the wrongdoer is *clothed* with the authority of State law." By creating an express Federal remedy, Congress sought to "enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it."

8. I am fully entitled to have the United States District Court hear my case and award damages to me for injuries I have suffered on this constitutional tort. The Supreme Court in *Owen*, supra, stated:

> A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees, and the importance of assuring its efficacy. It is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it has transgressed.

Section 1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivation, as well. *Robertson vs. Wegmann*, 436 U.S. 584; *Carey vs. Piphus*, 435 U.S. 247:

The knowledge that a municipality will be libel for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights.

WHEREFORE, I respectfully request that the Defendants Vincent Cerbone's and the Village of Mount Kisco's motions to dismiss and/or for summary judgment based on a constitutional immunity be denied, and for such other further and different relief as this Court may deem just and proper.

LYNN H. CONWAY

Sworn to before me this
16th day of September, 1982.

WAYNE P. STIX
Notary Public, State of New York
No. 60-4611800
Qualified in Westchester County
Term Expires March 30, 1988

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(SAME CAPTION)

JUDGMENT

82 CIVIL 4521 (MJL)

Defendants Bano Buick, Inc., Alfred Martabano and Alfred V. Martabano having moved to dismiss pursuant to Rule 12(b), Fed. R. of Civ. P., or in the alternative for summary judgment pursuant to Rule 56(b), and defendants Village of Mount Kisco and Detective Larry McKinsey having moved pursuant to Rule 12(c) for judgment on the pleadings, and the said motions having come before the Honorable Mary Johnson Lowe, United States District Judge, and the Court thereafter on March 21, 1983, having handed down its memorandum opinion and order (#54438) granting defendants' motion, it is,

ORDERED, ADJUDGED AND DECREED: That the complaint be and it is hereby dismissed in all respects.

/s/ Raymond F. Burghardt
Clerk

DATED: NEW YORK, N.Y.
March 25, 1983

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(SAME CAPTION)

AFFIDAVIT IN SUPPORT OF MOTION
FOR ATTORNEYS FEES

Vincent T. Cerbone being duly sworn deposes and says:

1. I am the Justice of the Village of Mount Kisco, sued herein as above, and I submit this affidavit upon review of the plaintiff's complaint and the court's records in this matter in support of the within motion for an award of attorneys' fees.

2. The "conspiracy" allegations in paragraph 10 of plaintiff's complaint that "on or about June 30, 1977, [d]efendant Vincent Cerbone conspired with Bano Buick, Inc., Alfred Martabano, and Alfred V. Martabano to arrest [p]laintiff Lynn Conway ..." is baseless. This is a mere rehash of similar but more specific charges, which plaintiff has already seen refuted, contained in paragraphs 5 and 6 of the affidavit of Wayne Stix, sworn to the 26th day February 1980 in the parallel action in Supreme Court Westchester ("Stix Affidavit")(Exh. A) as follows:

> "5. On June 29, 1977, the [d]efendant, Bano Buick and Alfred Martabano ... appeared before Mount Kisco Village Judge Vincent Cerbone, his cousin, and charged the plaintiff Lynn H. Conway of the crime of issuing a bad check ... ."

3. The above charge is completely false. The accusatory instrument (Exhibit B) was prepared by the Mount Kisco Police Department, signed by Alfred Martabano and sworn to before George Dunnigan, the desk sergeant of the Mount Kisco Police

Department, which is the usual procedure in misdemeanor complaints.

4. Plaintiff's further particular of "conspiracy," was already refuted, as follows:

> "6. On June 30, 1977, the same [d]efendant in the same capacity, proceeded and caused a warrant for arrest to be issued by Mount Kisco Village Justice Cerbone ... ."

5. This charge is also completely false. The warrant (Exhibit C) was issued by Acting Village Justice Martin Bender.

6. The "conspiracy" allegations of the present complaint are therefore baseless and contradicted on the record by my recusal of 4 August 1977.

7. The clerk's docket sheet for this case shows the following entries:

6/30/77	Defendant was arraigned and advised of her rights by Judge Bender. Defendant was released on her own recognizance for appearance in court on 7/7/77.
7/7/77	Defendant appeared in court with attorney Wayne Stix. Mr. Stix requested a copy of the information. (Sent out on 7/8/77) Mr. Martabano also apeared. Matter was adjourned to 7/21/77 for all purposes.
7/21/77	Defendant appeared in court with attorney Wayne Stix. Matter adjourned to 8/4/77 for all purposes.
8/4/77	Defendant appeared in court with attorney, Wayne Stix. A plea of NOT GUILTY was entered and a demand was made for a trial by jury
2/1/78	Notice of Motion filed by Mr. Stix returnable on (2/14/78). Office called Mr. Stix and advised him there was no court on the above date but the returnable (sic) date should be 2/16/78.

3/7/78 Judge Cerbone sent his decision to Mr. Stix — Matter on the calendar for 3/23/78 — for all purposes.

3/23/78 Defendant appeared in court with the defendant (sic). Alfred Martabano, Jr. appeared. Mr. Stix made a motion under 30.30. Motion denied. Judge Bender.

Mr. Stix intends to take on immediate appeal.

Jury Trial April 22, 1978 pre emtorily (sic).

Court to notify Alfred Martabano of Notice of Appeal.

6/7/78 Copies of the Notice of Motion by Mr. Stix dated 2/1/78. Judge Cerbones decision and the Notice of Appeal — also — Courts notes — sent to Carl Rubino. DA's Office.

5/24/79 Wayne Stix attorney for the defendant appeared in court before Judge V.T. Cerbone. Judge Cerbone previously disqualified himself from the case. Matter was adjourned to 6/7/79 for all purposes before Judge Joseph J. Cerbone.

6/7/79 Mr. Stix did not appear. Charlie Martabano, Alfred Martabano and Mr. Martabano, Jr. appeared before Judge J. Cerbone. ADA Jim Egan also appeared. Court Clerk to send a letter to Mr. Stix putting the matter on the calendar for 6/21/79.

6/21/79 Mr. Stix did not appear.

7/3/79 Letter on file advising Mr. Stix that the matter was put on the calendar for 7/26/79 at 7:30 P.M.

7/26/79 At the defendants request the matter was adjourned to 8/2/79 for all purposes.

8/2/79 No appearance. Warrant letter to be sent out — returnable 8/16/79.

8/16/79 Wayne Stix appeared on behalf of the defendant before Judge J. Cerbone. Judge J. Cerbone disqualified himself from the case. Matter to be transferred to another jurisdiction. Jim Egan ADA appeared for the People for the record. Mr. Stix noted his objection to the ADA appearing on this matter after 1½ years.

8/30/79 Jim Egan ADA appeared in court before Judge J. Cerbone and made a motion to withdraw the charge pending against Miss Conway.

(1) Time period that has passed and (sic) makes it extremely difficult to prepare for any kind of case.

Motion was denied.

Matter adjourned to 9/6/79 — so that Charles Martabano could be present.

9/6/79 Court Session cancelled. Matter adjourned to 9/13/79 for all purposes.

9/13/79 Defendant appeared in court with atty Fred Perlmutter filling in for Mr. Stix.

Matter adj to 9/20/79 for all purposes.

9/20/79 People moved to withdraw the charge (Lynn Farrell ADA) due to the period of time that has elapsed (not on the merits).

8. Although I disqualified myself from acting on this case for the reasons stated in the attached decision dated 7 March 1978 (Exhibit D), I nonetheless decided the motion to dismiss the accusatory instrument because at the time, I was the only available town justice.

9. The charge that "defendants Village of Mount Kisco and Vincent Cerbone refused for a period from August 4, 1977 to the date of dismissal by the Westchester County District Attorney,

September 20, 1979, to commence a jury trial as demanded by plaintiff Lynn Conway" is false. The docket entries above show that Lynn Conway and her attorney, Mr. Stix failed on numerous occassions to appear for court. The decision by plaintiff and her attorney to appeal the ruling against them also delayed the proceeding until the appeal was dismissed on March 2, 1979 (Exhibit E). The charge that "defendant Vincent Cerbone presided over said criminal matter, notwithstanding the fact that he had disqualified himself..." to the extent that it is not refuted by the docket entries showing that Judge Bender or Judge Joseph Cerbone presided, is misplaced. The court's clerk sets down the matter for periodic status conferences. There is only one judge available at any time in Mount Kisco. When Mr. Stix did appear before me, he represented that there were settlement negotiations outstanding (e.g. see his letter and proposed stipulation to the complaining witness (Exhibit F)). Mr. Stix could have requested an adjournment any time I was presiding had he wished to, as he apparently did on 5/24/79.

10. When the District Attorney made a motion to dismiss this case I granted it; Mr. Stix did not object to my presiding on that occasion.

Mount Kisco, New York
June 1983

/s/ Vincent T. Cerbone
Hon. Vincent T. Cerbone

Sworn to before me this
29th day of June 1983

/s/ Margaret Merlino
Notary Public

Margaret M. Merlin
Notary Public, State of New York
No. 4776283
Qualified in Westchester County
Commission Expires March 30, 1984

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

(SAME CAPTION)

AFFIDAVIT IN OPPOSITION

Wayne Stix affirms the following under penalties of perjury:

1. I am an attorney at law, duly admitted to practice before the Courts of the State of New York. I appear herein as the attorney for the Plaintiffs and submit this Affidavit in opposition to the moving Defendants' motion to dismiss Plaintiffs' first, second, and fourth causes of action.

2. On approximately April, 1977, Plaintiffs brought their automobile to Bano Buick, Inc. of Mount Kisco, New York, for repairs. The repairs were done improperly, requiring the Plaintiffs to call upon the Defendant Bano Buick again for service. Jeffrey M. Conway discovered that the engine in the car being repaired had been replaced by a scrap engine which altogether was in appropriate for the automobile. When they arrived at the Defendant's place of business to pick up their car, they were bullied and intimidated by the service manager and mechanics. In fear, they wrote out a check to Bano Buick and initiated their escape. The next morning the Plaintiffs called their bank, Dry Dock Savings Bank, in White Plains, and stopped payment on the check.

3. Shortly thereafter, upon information and belief, the Plaintiffs' check was returned unpaid to Defendant Bano Buick, Inc. However, Dry Dock Savings Bank incorrectly stamped the check "Insufficient Funds." Joseph W. Shane, the Assistant Vice President of the Dry Dock Savings Bank, corrected the bank error in a letter to Plaintiff advising:

Dear Mr. Conway;

On 5/27/77 we sent to you an advice indicating that a check you issued to Bano Buick Inc. was returned for insufficient funds.

The advice should have been marked Payment Stopped.

Very truly yours,

Joseph W. Shane
Assistant Vice President

A copy of this letter is attached hereto and made a part hereof as Plaintiffs' Exhibit A.

4. Commencing approximately the beginning of June, Plaintiff began receiving threatening telephone calls from the Mount Kisco Police Department, generally, and Detective McKinsey specifically. The gist of these phone calls, which were several, was that if the Plaintiffs did not pay the Defendant Bano Buick the money they would be arrested and dire consequences would result. Plaintiffs explained to the police that the payment had been stopped because the service promised to be performed on the car had not been rendered.

5. On June 29, 1977, the Defendant, Bano Buick and Alfred Martabano, individually and as an officer of Bano Buick, Inc. appeared before Mount Kisco Village Judge Vincent Cerbone, his cousin, and charged the Plaintiff Lynn H. Conway of the crime of issuing a bad check in violation of Section 190.05-2 of the Penal Law of the State of New York, a misdemeanor crime.

6. On June 30, 1977, the same Defendant in the same capacity, procured and caused a warrant for arrest to be issued by Mount Kisco Village Justice Cerbone, Defendant Alfred Martabano's cousin, for the arrest of Plaintiff Lynn Conway. On June 30, 1977, at approximately 7:00 p.m. Lynn Conway was arrested and taken into custody to the Mount Kisco Village Police Station and there

imprisoned and detained for a period of seven (7) hours prior to arraignment on the misdemeanor complaint. The Mount Kisco Police made the arrest upon Lynn Conway in the Village of South Salem, New York, wherein, it is submitted, they had no authority or right to enforce the warrant. Thereafter and up through the middle of 1979, the Defendant Bano Buick, Inc. and Alfred Martabano continued to prosecute this private criminal complaint in violation of County Law Section 700 which states in part that "It shall be the duty of every District Attorney to conduct all prosecutions for crimes and offenses cognizable by the courts of the county for which he shall have been elected or appointed." Also see *People v. Van Sickle*, 13 N.Y. 2d 61 and *People v. Miller*, N.Y.L.J. September 14, 1978, page 11.

7. The matter came on the Mount Kisco Justice Court calendar for the third time on August 4, 1977. At that appearance, Plaintiff Lynn Conway appeared, pled "not guilty" and demanded a jury trial. The District Attorney did not take part in any proceedings and refused prosecution of Lynn Conway until the final Court appearance in 1979 when the District Attorney took jurisdiction and refused to prosecute.

8. On August 4, 1977, Justice Vincent Cerbone disqualified himself because in the court's words "That his brother had represented Bano Buick, Inc." On March 23, 1978, Lynn Conway was still awaiting trial which had been demanded over seven (7) months before. A motion to dismiss her violation of Criminal Violation Law Section 30.30 was submitted to the Court. Judge Cerbone, notwithstanding the fact that he disqualified himself on August 4 due to a conflict of interest, decided the motion against Lynn Conway. For the next year and a half, Lynn Conway repeatedly demanded a trial which was refused by the Court. She was called upon to appear in Court at least fourteen (14) times over that period.

9. On or about January, 1979, Village of Mount Kisco Judge Bender was replaced as Judge by Joseph Cerbone, Judge Vincent Cerbone's brother. Upon Lynn Conway's second appearance in Joseph Cerbone's term, Judge Joseph Cerbone disqualified

himself not because he had been the lawyer for Bano Buick, Inc. but because he was Alfred Martabano's cousin.

10. Defendant Bano Buick, Inc. and Defendants Martabano moved to dismiss Plaintiff's complaint on the grounds that "No final determination of the merits of said misdemeanor complaint has been rendered by any Court and such final determination on the merits is a condition precedent to bringing on this action." Pursuant to New York law, an expressed determination on the merits in a criminal prosecution is not necessary, and the intrinsic want of probable cause is properly inferred from the determination of a criminal action. Contrary to the Defendants' position, no final determination on the merits of a misdemeanor complaint (after trial) is required. *Prosser on Torts* [4th Edition] Section 119, page 839; *Gastman v. Myer*, 285 A.D. 611, 139 N.Y.S. 2d 605; *Broughton v. State of New York*, 37 N.Y. 2d 451, 457, 373 N.Y.S. 2d 87; *Budgar v. State*, 414 N.Y. Sup. 2d 463, 468 [1979]; 52 Am Jur 2d, Section 49, page 216.

11. The Court of Appeals in *Halberstadt v. New York* Life Insurance Company, 194 N.Y. 1, 10 in 1900 established what has become known as the Halberstadt Rule. The gist of the rule as announced and followed by all Courts in the State of New York to the present states that "Where a criminal proceeding has been terminated in favor of the accused by judicial action of the proper court or *official* [in this case the District Attorney's office moving to dismiss] in any way involving the merits or propriety of the proceeding or by a *dismissal* or *discontinuance* based on some act chargeable to the complainant as his consent or his withdrawal or abandonment of his prosecution, a foundation in this respect has been laid for an action of malicious prosecution..."

In the case at bar the Plaintiff Lynn Conway herein, the Defendant in the criminal action, demanded and attempted to receive a trial on the merits throughout the two (2) year life of the criminal complaint and at no time did she avoid, evade, or prevent judicial investigation.

11. Immediately preceding dismissal by the District Attorney, your Affirmant as counsel for Plaintiff in the criminal action made known to the District Attorney's office the entire factual background ot the case. Therefore, the September 26, 1979, letter to Defendant's attorney from Lynn Farrell, Assistant District Attorney, Westchester County, attached as Defendant's Exhibit 2, belies the facts. Prior to discontinuing the action, the District Attorney requested and received from Lynn Conway a general release stating in effect that the District Attorney's office would not be sued for malicious prosecution. Referring still to the District Attorney's letter attached to the Defendant's papers as Exhibit 2 and referring specifically to Paragraph 1 thereof, the time which elapsed from the date of the incident to the date of dismissal is not such a delay as to prevent successful prosecution. In the case *The People of the State of New York v. Robert Jones*, Westchester County Indictment 511/1978, the Westchester County District Attorney's Office successfully prosecuted the Defendant who was not even indicted or a know defendant for approximately 39 months after the criminal transaction. Furthermore, upon information and belief, within weeks after the transaction between the parties herein occurred, the Westchester County district t Attorney's Office investigated Defendant's complaint on two (2) occasions; once by Assistant District Attorney O'Reilly and once by Assistant District Attorney Purcell. In both instances, the District Attorney's Office refused to handle the claim.

12. When the prosecution terminates a criminal action in a manner which precludes revival, an action lies from malicious prosecution. *Prosser on Torts*, Supra; restatement on Torts, second edition, chapter 29, section 659 and 660, pages 419, 421. More specifically, an assuming auguendo that the District Attorney declined prosecution because of the lapse of time. *Budgar v. State*, supra, and *Rite v. Myer*, 160 A.D. 752, 146 N.Y.S. 75; the Court held that dismissal for lack of a speedy trial is a sufficient termination on which to base an action for malicious prosecution. The only bar to the Plaintiff's action herein would have been if the criminal proceedings were terminated by compromise, fraud, or suppression of evidence, *Halberstadt v. New York Life Insurance Company*, Supra.

13. Referring to Plaintiff's Affidavit, Paragraph 6, page 3, wherein Defendants relate that "The Village Justice for the Village of Mount Kisco objected to this disposition of the criminal action and instructed the Assistant District Attorney to proceed with the trial" is of no probative value except to point out that two years after Judge Cerbone disqualified himself from the case he was still presiding over it. On the date in question, Judge Cerbone became irate upon the news that the District Attorney would not prosecute Lynn Conway. Judge Cerbone's reaction which he shouted throughout the crowded courtroom was "You will continue to prosecute this case; you will try it; and you will get a conviction!" The Village Justice had no standing whatsoever to determine which cases the District Attorney shall prosecute.

14. Even if Defendant's statement set forth in Paragraph 8th of their attorney's affidavit on page 5 is taken as true, it is no escuse for causing Lynn Conway's arrest and continuing the prosecution for two years after the true facts were made known to them. The fact that the Mount Kisco Police made threatening phone calls to Lynn Conway both prior to and after the criminal action was started is an abuse of power and authority. No public agency is to be used by private citizens as a personal collection agency to collect a civil debt. Furthermore, any threat by Alfred Martabano and Bano Buick, Inc. to bring or restrain from bringing a criminal action to collect a civil debt as admitted in paragraph 8, page 5 of Charles Matabano's Affidavit is in and of itself an abuse of process.

15. The commencement of a criminal proceeding in an effort to affect the collection of civil debt is conduct the courts find particularly odius and can be made the basis for a malicious prosecution action. 52 Am Jur, 2d Sectin 49, page 191. In the factual situation just recited, an inference of malice is rightfully drawn. Assuming for the sake of argument that the Defendant has demonstrated to the Court that there is a genuine dispute concerning the true set of facts or the inferences to be drawn by a reasonable person from the facts which led to the prosecution, the uniform rule requires that the instant motion be denied and that the matter be resolved at trial. *Munoz v. The City of*

New York, 18 N.Y. 2d 6, 271, N.Y. Sup. 2d, 645, 650. The facts that a court, which admitted prejudice in favor of the Defendants herein, issues a warrant for the criminal Defendant's arrest because of a complaint is in evidence to be considered in determining probable cause in a defense for a malicious prosecution action. *Pandolfo v. Brodell*, 161 N.Y. Sup. 2d, 494.

16. Your deponent cannot dispute that portion of the Defendant's motion concerning the identity and/or existence of Alfred Martabano, Sr. or Jr. In prior documents, however, Charles Martabano stated that "Your deponent feels impelled to point out to the Court that the Defendant, Alfred Martabano, President, and Alfred Martabano, individually, are not one and the same person, but rather are father and son, respectively." Attached hereto and made a part hereof is a copy of that statement as Plaintiff's Exhibit B. This information supplied by the Defendants. Plaintiffs implied that a father and son of the same name were commonly known as Senior and Junior. Therefore, Plaintiff will consent that an Order be entered striking the words "Sr." and "Jr." from the caption. However, at this point it is Plaintiff's intention to sue both the elder and the younger Alfred Martabano by whatsoever names and titles they go by.

17. Concerning the consent and proposed settlement referred to in Plaintiff's moving papers and attached as Defendant's Exhiibt 5, I call the Court's attention to the fact that on July 26, 1977, Alfred Martabano did not have a lawyer and was representing himself and Bano Buick, Inc. in the private criminal complaint. He was in effect attorney pro se. At that time and place the Plaintiffs herein tried to resolve the matter by way of stipulation. However, subsequent occurrences between Mr. Martabano and the Plaintiffs herein made it impossible; but during the negotiation, of course, it was necessary to have Mr. Martabano sign the stipulation first since he was the aggressing party. The Defendants' attorney should know that the introduciton of the attempted settlement at trial is objectionable and of no probatie value in either a criminal or civil matter. Curiously, only the Defendants ever mentioned this stipulation and Plaintiffs have never attempted to make any collateral use of it.

18. It is clear that the totality of the Defendant's motive in the entire transaction was to use the criminal law for the collateral purpose of forwarding their own private interests. This is prima facia evidence of the want of probable cause. The rule in *Halberstadt*, Supra, holds that "Want of probable cause for instituting a criminal proceeding may be cause to appear from acts inconsistent with an honest belief in the guilt of the accused...and that the law was set in motion to serve defendant's own personal purpose." Also see C.P.J.S. 2d, Section 32, page 993. As further evidence of this fact is the trouble and length the Mount Kisco Police went to on this minor criminal allegation for the Defendant, an extremely influential citizen of that village. Also, the evidence of motions and acts of Village Judge Vincent Cerbone and his brother Joseph Cerbone, cousins and attorneys for the Defendants.

WHEREFORE, it is respectfully requested that the Defendant's motion be in all respects denied and for such further and other different relief as the Court may deem proper.

Dated: February 25, 1980.
White Plains, New York

_____
Wayne Stix

Under penalties of perjury.

STATE OF NEW YORK: COUNTY OF WESTCHESTER
Loc. Criminal COURT Village OF Mt. Kisco, N.Y.

The People of the State of New York

against

Lynn H. Conway

Defendant

Accusatory Instrument Misdemeanor Complaint

Alfred Martabano, residing at D/B/A Bano Buick, main st. Mt. Kisco, N.Y., by this Misdemeanor Complaint makes written accusation as follows.

That Lynn H. Conway, on the 5th day of May 1977, at Main st., in the village of Mt. Kisco, N.Y., County of Westchester, New York, did commit the offense of Issuing a bad check a misdemeanor in violation of Section 190.05-2 of the penal Law of the State of New York, in that (s)he did, at the aforesaid time and place*

Count One

A person is guilty of issuing a bad check when: He passes a check knowing that the drawer there of does not have sufficient funds with the drawee to cover it, and he intends or believes at the time the check is passed that payment will be refused by the drawee upon presentation, and payment is refused by the drawee upon presentation.

The facts upon which this Misdemeanor Complaint is based are as follows:

That the above named defendant on the 5th day of may, 1977 did issue check to Bano Buick, Inc. in the amount of $431.34. Said check drawn on the Dry Dock Savings Bank, New York,N.Y. Said check number being #154 was presented and payment was refused, reason being insufficient funds. All contrary to the provisions of the statute in such case made and provided.

The foregoing factual allegations are based upon personal knowledge of the complainant.

STATE OF NEW YORK: COUNTY OF Westchester
Loc. Criminal COURT village OF Mt. Kisco, N.Y.

Warrant of Arrest

IN THE NAME OF THE PEOPLE
OF THE STATE OF NEW YORK:

To any Police Officer of the N.Y. State Police/Mt. Kisco Police Department, New York State, Mt. Kisco, N.Y.

An Accusatory instrument having been this day laid before this court, that the offense of Issuing a bad check has been committed, and accusing Lynn H. Conway thereof.

YOU ARE, THEREFORE, COMMANDED forthwith to arrest the above named Lynn H. Conway and bring her before this court at 104 main st. in the village of Mt. Kisco County of Westchester, N.Y.

Issued this 30 day of June, 1977.

/s/ _____
Justice

May be executed in County of issuance or adjoining County. 120.70.

VILLAGE COURT MT. KISCO: STATE OF NEW YORK
COUNTY OF WESTCHESTER

PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

– against –

LYNN H. CONWAY,

Defendant.

Defendant's Motion to Dismiss Accusatory Instrument for a Denial of Right to a Speedy Trial is denied.

The facts are briefly as follows:

An accusatory instrument charging the defendant with issuing a bad check in violation of Section 190.05-2 of the Penal Law of the State of New York was executed on or about the 19th day of June 1977 by Alfred Martabano doing business as BANO BUICK, INC. on Main Street, in the Town of Mount Kisco, County of Westchester and State of New York.

On June 30, 1977 the defendant was arraigned by Judge Martin Bender and released on her own recognizance for appearance on July 7, 1977.

On July 7, 1977 the defendant appeared in Court with her attorney, Wayne P. Stix, and the attorney for the defendant requested an adjournment to July 21, 1977.

On July 21, 1977 both the defendant and complainant requested an adjournment in the hopes of resolving the matter.

On August 4, 1977 the defendant appeared with attorney, entered a pleas of Not Guilty and demanded a jury trial. At that time the presiding Justice Vincent T. Cerbone recused himself from this matter due to the fact that on prior occasions he had represented Bano Buick Inc. and referred the matter to the Acting Justice Martin Bender.

Judge Bender was recently appointed a Town Justice. The matter will be transferred to his Court and the complaining witness, the defendant and her attorney will appear on March 23, 1978 at 7:30 PM at the Town Court of the Town of Mount Kisco, 104 Main Street, Mount Kisco, New York, for all purposes.

Mount Kisco, New York
March 7, 1978

/s/ _____
Town Judge

293-1978
November Term 1978

At a term of the Appellate Term of the Supreme Court of the State of New York for the 9th and 10th Judicial Districts, held in Nassau County, on the 2nd day of March, 1979.

Present—Hon. Thomas P. Farley *Presiding Justice*
" " Mario Pittoni
" " Morrie Slifkin *Justices*

(SAME CAPTION)

The above named Lynn H. Conway the defendant herein, appealed to this Court from an order of the Village Court, Village of Mount Kisco, County of Westchester, entered the 7th day of March 1978 which order denied motion to dismiss the accusatory instrument and the said appeal having been submitted by Wayne P. Stix, Esq., of counsel for the appellant, and no one appearing for the respondent, and due deliberation having been had thereon;

It is hereby ordered and adjudged that the appeal from order be, and the same is hereby, dismissed.

MORRIS SLIFKIN
Justice, Appellate Term

Wayne P. Stix
Attorney at Law
175 Main Street
White Plains, New York 10601

914-761-8791

July 20, 1977

Mr. Alfred Martabano
Bano Buick Inc.
193 Main Street
Mt. Kisco, New York 10549

RE: PEOPLE v. LYNN H. CONWAY

Dear Mr. Martabano:

Pursuant to our telephone conversation I have enclosed herewith a copy of the proposed stipulation in regards to a disposition of the above named matter.

If the proposed stipulation meets with your approval please sign the same in the presence of a notary public and return it to me keeping the copy for yourself.

Thank you very much.

Very truly yours,

WAYNE P. STIX

WPS/mc
Enclosure

cc: Lynn H. Conway

VILLAGE OF MOUNT KISCO : STATE OF NEW YORK
COUNTY OF WESTCHESTER

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiff,

– against –

LYNN H. CONWAY,

Defendant.

STIPULATION

ALFRED MARTABANO, being duly sworn deposes and says:

That he is the complainant-victim in the above said matter.

That he commenced this misdemeanor action on June 21, 1977 by filing an accusatory instrument misdemeanor complaint with the police department, Village of Mt. Kisco.

That in consideration of Four Hundred and Thirty-One Dollars and Thirty-Four Cents ($431.34) to be received by me from LYNN H. CONWAY I agreed to withdraw said accusatory instrument misdemeanor complaint and any and all other criminal charges existing against LYNN H. CONWAY.

DATED: Mt. Kisco, New York
26 day of July, 1977.

/s/ _____
ALFRED MARTABANO,
BANO BUICK
Main Street
Mt. Kisco, New York

Sworn to before me this
26 day of July, 1977.
s/ Louise Geidel

SUPREME COURT — STATE OF NEW YORK
SPECIAL TERM, PART/ WESTCHESTER COUNTY

Present: I
HON. RICHARD J. DARONCO

---x

LYNN H. CONWAY and JEFFREY M. CONWAY,

Plaintiffs,

– against –

BANO BUICK, INC.; ALFRED MARTABANO, SR., individually and as an officer of the BANO BUICK, INC.; ALFRED MARTABANO, JR., individually and as an officer of the BANO BUICK, INC.; THE VILLAGE OF MOUNT KISCO, NEW YORK; THE POLICE DEPARTMENT OF MOUNT KISCO, NEW YORK; and DETECTIVE McKINSEY,

Defendants.

---x

Index Number 2455, 1980
Motion Date 4/20, 1982
Motion Cal. Number 41
Trial Cal. Number

The following papers numbered 1 to 23 read on this motion by defendants Village of Mount Kisco, New York and Detective McKinsey in an action for malicious prosecution and false arrest for summary judgment.

Upon the foregoing papers it is ordered that this moton is granted and this action is severed as to these defendants. Acts of the court and the police officer are judicial and quasi judicial in nature, and as such, they are immune from civil suit, however erroneous or wrong it may be, or however malicious even the

motive which produced it to the injury of the plaintiff (see *Shanbarger v. Kellogg*, 35 A.D. 2d 902, mot for lv to app den 29 N.Y. 2d 485, app dsmd 29 N.Y. 2d 649, cert den. 405 U.S. 919, 1 Carmody Wait 2d, §3.16).

WAYNE P. STIX, Atty. for Pltfs., 175 Main St., White Plains, New York 10601 J. BOYD HENSON, Atty. for Defts., Village of Mt. Kisco & McKinsey, 149 Grand St., White Plains, New York 10601

GERALD W. MATLIN, Atty. for Defts., Bano Buick, Alfred Martabano, Sr., and Alfred Martabano, Jr., 10 W. Hyatt Ave., Mt. Kisco, New York 10549

Dated 7/23/82 Entered 7/23/82 _____

J.S.C.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(SAME CAPTION)

Pro Se
82 Civ. 4521
(M.J.L.)

AFFIDAVIT IN OPPOSITION TO JUSTICE CERBONE'S MOTION FOR COSTS AND ATTORNEYS' FEES
AND
IN SUPPORT OF CROSS-MOTION UNDER F.R.C.P. 8(a) FOR RELIEF FROM JUDGEMENT PURSUANT TO F.R.C.P. 60(b) (3), (6).

LYNN H. CONWAY, being duly sworn deposes and says:

1. I am the plaintiff in the within action and submit this affidavit upon review of all prior papers in opposition to defendant Cerbone's motion for costs and attorneys' fees and in support of the instant cross-motion based upon misrepresentation by the adverse parties and the doctrine of the Supreme Court of the United States as set forth in *Conley v Gibson*, 78 S.Ct. 99, 102.

2. Defendant's motion asks costs and attorneys' fees against plaintiff and her attorneys for initiating a harassing action in bad faith. Plaintiff cannot be found to have acted in bad faith since this action was brought on the advice of counsel.

3. The restricting of plaintiff's claims against Justice Cerbone to actions in his judicial capacity, if anything, is a consequence of technical failure in the contructing of this suit for which plaintiff should not be held liable.

4. Justice Cerbone's affidavit should be rejected for the following reasons:

a) The docket sheet upon which he relies to make his point is not certified;

b) In *People v Cerbone* 113 Misc. 2nd 740; NY Supplement 449 N.Y.S. 2d 903 the herein and therein defendant was found by the court to have given "testimony...critically tainted..." and as a result of that case the herein defendant was the subject of a ruling by the State Commission on Judicial Conduct which found that he should be removed from office, the *Reporter Dispatch*, Sunday, August 21, 1983 p.1.

5. Moreover, if the herein defendant felt that the plaintiff and counsel's conduct in the Court of Mt. Kisco was contemptuous, judicial remedy was available there.

6. Summary judgement for the other defendants in this case was entered pursuant to F.R.C.P. 56(e) and deemed "appropriate" by the court.

7. It is respectfully submitted that this court found those defendants to have made a "convincing presentation" (Decision p. 13), only because said defendants engaged in patent misrepresentation *where* they full well knew of the existence of objective material which would not support this and would in fact demolish their pivotal statement, as follows:

> "In this deposition of March 3, 1981, Alfred Martabano states that the Stop-Payment Advice and the check which had been returned for insufficient funds, were presented to his attorney after his repeated attempts at contacting plaintiff proved unsuccessful. Defendant Bano Buick in trying to resolve the matter, attempted contacting plaintiff by telephone on May 31, 1977, June 1, 1977, June 6, 1977, June 14, 1977, June 20, 1977, and June 21, 1977. 'When each call met with no success whatsoever, it became evident to the defendant that the check was given in bad faith.' (Alfred Martabano Affidavit, p.5)."

8. With respect to the foregoing, defendant Martabano knew full well that from the State action there existed three EBT's which were chock full of facts disproving their contention upon which summary judgement was granted.

9. The United States Court of Appeals for the Fifth Circuit on January 11, 1958:

> "But under the rule so often repeated[4] by us, and even more recently restated[5] in *Conley v Gibson*...
>
> . . . . . .
>
> 4. A motion to dismiss 'should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim***;' *Des Isles v Evans*, 5 Cir., 200 F.2d 614, 615; *Millet v Godchaux Sugars, Inc.*, 5 Cir., 241 F.2d 264, at page 265 and see our cases collated in note 1.
>
> 5. In appraising the sufficiency of the complaint, we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which entitle him to relief...
>
> ***The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.***"
> *Baldwin v Morgan* 251 F.2d 780.

10. In view of the foregoing, it is respectfully submitted, that the hereunto annexed Exhibits make plain that the defendants misrepresented and ignored a body of existing facts. Hereunto annexed is the EBT of Alfred Martabano and Alfred V. Martabano as EXHIBIT A; annexed hereto as EXHIBIT B is the EBT

of Detective Larry McKinsey; annexed hereto is EXHIBIT C is the EBT of plaintiff and her husband Jeffrey M. Conway.

11. The EBT of Alfred Martabano makes in abundantly clear that plaintiff's husband, Jeffrey Conway visited defendant Martabano in person prior to the initiating of the complaint, EXHIBIT A pp.23-24 & ff.

12. Moreover, the EBT of Detective McKinsey makes it plain that the Bank Advice dated May 26, 1977, the instrument which made plain that the plaintiff's check was *never* an issue of insufficient funds, was purportedly never seen by Detective McKinsey (EXHIBIT B p.13). Moreover, McKinsey in EXHIBIT B p.36, denies having been shown by the plaintiff her letter from the Drydock Savings Bank yet, McKinsey makes clear that he was accompanied at the time of this arrest by investigator Murphy from the State Police Barracks in Somers, N.Y. who could corroborate the plaintiff's statements that she presented the Drydock letter to McKinsey.

13. The EBT of the Conways reveals a significant body of factual information which is in total disagreement with the "convincing presentation" upon which summary judgement was rendered against plaintiff. The Conways' EBT is hereto annexed as EXHIBIT C. Pages 8, 9, 99-104 make it plain that the Conways had dealt with Bano Buick successfully on a prior occasion; on p. 25 it is made clear that plaintiff told Alfred Martabano about the stop-payment and why this had been done. Pages 66, 87, 121, 126 make plain that the check was originally issued in good faith with no intention of stopping payment until after the car was found to be in a defective condition after its removal from the premises of Bano Buick. Page 87, 130, 133-137, 172, 208, 210 make plain that the Conways had exhaustedly attempted to resolve issues with Bano Buick.

14. In view of the foregoing, a review of EXHIBIT A at p. 57, the EBT of A.V. Martabano, previously exhibited in the plaintiff's affidavit in opposition to the motion for summary judgement makes it plain that the attorney who provided the "good faith" sanction for the private criminal complaint against the

plaintiff herein was Justice Vincent Cerbone. This fact taken together with the discrepancy between the Conways' testimony affirming that Detective McKinsey had the opportunity to make a complete and proper police investigation by having been shown Drydock letter vis a vis McKinsey's denial of knowledge of said letter raise, it is respectfully submitted, serious questions going to the merits as to make a fair ground for litigation of a conspiracy and despite the fact that Justice Vincent Cerbone would be immune from damages he would not be immune from a form of declaratory relief in a fashioned judgement for the benefit of the plaintiff herein.

15. In view of these things it is respectfully submitted that the non-judicial defendants prevailed in summary judgement only by way of patent misrepresentation in the face of an existing body of factual data should have been disclosed.

16. WHEREFORE, it is respectfully requested that defendant Cerbone's motion for costs and attorneys' fees be denied and that the relief requested in the cross-motion be granted.

/s/ Lynn H. Conway

LYNN H. CONWAY
Plaintiff - Pro Se
Lakeview Drive
North Salem, N.Y. 10560
(914) 669-9491

Sworn to before me
this lst day of September, 1983

/s/ Alma Mruz

NOTARY

ALMA MRUZ
Notary Public in the State of New York
Resident in and for Westchester Co.
Commission Expires March 30, 1984
Notary Reg. No. 4757265

EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER [1]

(SAME CAPTION)

March 3, 1981
1:15 o'clock p.m

EXAMINATION BEFORE TRIAL of the Defendants, ALFRED MARTABANO and ALFRED V. MARTABANO, pursuant to Court Order of the Hon. George Beisheim, Jr., dated January 16, 1981, at the Westchester County Courthouse, 111 Grove Street, White Plains, New York, on March 3, 1981 at 1:15 p.m., before a Notary Public of the State of New York.

APPEARANCES: [2

WAYNE P. STIX, ESQ.
Attorney for Plaintiffs
175 Main Street
White Plains, New York 10601

J. BOYD HENSON, ESQ.
Attorney for Defendants, Village of
Mt. Kisco, Police Department of Mt. Kisco,
and Detective McKenzie
149 Grand Street
White Plains, New York 10601

GERALD W. MATLIN, ESQ.
Attorney for Defendants, Bano Buick, Inc.
and Martabanos.
10 West Hyatt Avenue
Mount Kisco, New York 10549

• • •

IT IS HEREBY STIPULATED AND AGREED by and between counsel for the respective parties hereto that all rights provided by the C.P.L.R., including the right to object to any question, except as to the form, or to move to strike any testimony at this examination, are reserved; and, in addition, the failure to object to any question or to move to strike any testimony at this examination shall not be a bar or waiver to make such motion at, and it is reserved for, the trial of this action.

IT IS FURTHER STIPULATED AND AGREED that this examination may be sworn to, by the witness being examined, before a Notary Public other than the Notary Public before whom the examination was begun; but the failure to do so, or to return the original of this examination to counsel, shall not be deemed a wiaver of the rights provided by Rules 3116 and 3117 of the C.P.L.R. and shall be controlled thereby. [3

The filing and certification of the original of this examination is waived.

IT IS FURTHER STIPULATED AND AGREED between the attorneys for the respective parties hereto that a copy of this examination shall be furnished to the attorneys for the witness being examined, without charge.

• • •

ALFRED MARTABANO, one of the Defendants herein, having first been duly sworn by Sharon Kronenberg, a Notary Public of the State of New York, was examined and testified as follows:

EXAMINATION BY

MR. STIX:

Q What is your name?

A Alfred Martabano. [4]

Q Where do you live?

A Route 22, Katonah, New York.

Q That's your entire name, Alfred Martabano?

A Yes.

Q That's where the problem obviously was, with the "V." Your son is, Alfred V. Martabano?

A Yes.

Q Could you tell me, on or about January 1st, 1977, if you were employed, sir?

A If I was employed?

Q Yes.

A Yes.

Q Who did you work for?

A Bano Buick.

Q That's a corporation?

A Yes, sir.

Q What was your position at Bano Buick?

A President.

Q Is Bano Buick, Inc.—was it on January 1st, 1977, a New York State corporation?

A Yes.

Q Can you tell me when that corporation was incorporated, when it was formed? [5]

A October 14, 1965.

Q Have you been the President since it has been incorporated?

A Yes.

Q Are you also a shareholder of that corporation?

MR. MATLIN: Objection. I don't see the relevancy of that. We are not having an examination as to its assets.

MR. STIX: It may have some relevancy.

Q Were you an officer or director of that corporation, on January 1st, 1977?

MR. HENSON: He said, he was President.

Q Were you a director?

A I'm President.

Q Does Bano Buick have a Board of Directors?

A No.

Q Did Bano Buick, on January 1st, 1977, have any Vice Presidents?

A Yes.

Q Who was that or who were they?

A I think it was Alfred V. Martabano.

Q Any other Vice Presidents?

A No. [6]

Q Who was the Treasurer?

A I think, I am.

Q And the Secretary?

A Margaret.

Q What is her last name?

A Martabano.

Q Is she any relation to you?

A She's my wife.

Q Were you employed by any other business, on January 1st, 1977?

MR. MATLIN: Again, I am going to object to that. It is irrelevant whether he was or wasn't. We are not conducting an examination as to what his assets were.

MR. STIX: Are you directing him not to answer?

MR. MATLIN: Yes, I am.

MR. STIX: I'm going to get a ruling.

MR. HENSON: Why don't we get through the rest of it. Why don't you mark it for a ruling, and then we will put it all together and go for them all at the same time. That's what the Judge will tell you. [7]

MR. STIX: I don't know whether he will tell me that or not.

Q Were you an officer or a director in any other business, on January 1st, 1977?

MR. MATLIN: Same objection.

Q Were you an employee in any other corporation in 1977?

MR. MATLIN: Same objection.

Q Were you a partner, limited, general, or special, in any other partnership or joint venture, on January 1st, 1977?

MR. MATLIN: Same objection.

Q Bano Buick, the corporation, did it own or lease the premises known as Bano Buick, on January 1st, 1977?

A Lease.

Q Is that by a written lease?

A I think there is a lease.

Q Who is the Landlord?

A I'm not sure.

Q If we leave a blank in the transcript, can you find that out and fill it in?

MR. MATLIN: Yes. [8]

A

Q Do you recall who the rent checks are made payable to?

A Yes.

Q Who is that?

A Margaret.

Q Margaret Martabano?

A Yes.

Q In January of 1977, did Bano Buick have a repair shop or maintenance shop?

A Yes.

Q Who was the manager of the Service Department, in January of 1977?

A I don't remember.

Q Do you have any records you could look at to refresh your memory, back at the office?

A I'm sure.

Q If I leave a blank in the transcript, and you can find that informaton, please put it in?

A Yes.

Q If you cannot, please make a notation that you cannot find the information. [9]

Do you know who the manager of the Service Department was in April through June of 1977?

A No.

Q I'll leave a blank in the transcript, and if you could find that information, please supply it.

A Yes.

Q Do you know whether a mechanic worked for Bano Buick named Ken Bratco, between April and June of 1977?

A Yes.

Q Is he still employed there?

A No.

Q Do you know when he started with Bano Buick?

A No.

Q Do you know when he left?

A I really don't know.

Q Could you check your records and give me the date he started and the date he left, please?

A Yes.

Q Did there come a time, on or about April 15, when Jeff and Lynn Conway brought in an automobile to Bano Buick to be repaired, that you know? [10]

MR. MATLIN: Do you know of your own personal knowledge?

A No, I don't know.

Q Do you know, whether or not Jeff and Lynn Conway brought in an automobile to Bano Buick for service, on or about January 4, 1977?

A I don't remember.

Q Do you have a service manager that oversees that department on a day to day basis?

A Yes.

Q As the President of Bano Buick, what are your daily functions?

A Overseeing the business.

Q But you don't get into the daily routine of the Service Department?

A Yes, I do.

Q Are you familiar with the Bano Buick service forms that are filled out when customers come in?

A Yes.

MR. STIX: Please, mark this for identification.

(Whereupon a Bano Buick, Inc. bill dated January 4, 1977, was marked Plaintiff's Exhibit No. 9, for identification. [11]

MR. STIX: Mark this as Plaintiff's 10 for identification.)

(Whereupon a Bano Buick, Inc. bill dated 4/15/77, was marked Plaintiff's Exhibit No. 10, for identification.)

Q I show you what has been marked Plaintiff's 9, for identification, and ask you if you recognize the form as being the form used by Bano Buick Service Department?

A Yes, I do.

Q Were these the forms used in the Service Department of Bano Buick when a car came in for repair, on that date, sir?

A Yes.

Q Who filled these forms out?

MR. MATLIN: In general, who fills them out?

Q The service manager?

A The service adviser.

Q Is that filled out when the car comes in, the instructions portion?

A Yes. [12]

Q What I'm showing you – I'm just looking at the forms without calling your attention to any specific writing at this point, just some general background.

I assume there is an original and a certain number of copies made when a car comes in?

A There are other copies, yes.

Q Who keeps the original?

A Bano Buick.

Q One copy is given to the customer, is that right?

A Yes.

Q Are there any other copies?

A There is the work copy which is put in the customer's file.

Q Would that be pink?

A No, it is cardboard. We call it cardboard, a hard copy.

Q Did you ever see the defendant's 1973 Opel Manta in Bano Buick, Inc. repair shop in January of 1977?

A Yes, I would have to say I did.

Q Do you have any specific memory?

A No.

Q Without looking at any documentation, do you have any personal memory of what was to be done with that car? [13]

A No.

MR. MATLIN: At what time, now or then?
MR. STIX: Now.

Q I ask you to look at what has been marked Plaintiff's Exhibit 9 , for identification, and see if that refreshes your recollection as to why this automobile was there.

A It does not.

Q Did there come a time in January of 1977, or February of 1977, when you had any conversation with the Conways?

A Not that I remember.

Q Do you know where Bano Buick, Inc. purchased its new parts for automobiles, in January of 1977?

A Buick Motor Car Distribution and jobbers.

Q Do you recall what jobbers were used in January of 1977?

A No.

Q If I ask you the same question for April of 1977, would you answer be the same?

A Yes. [14]

Q Are you a mechanic yourself?

A A little.

Q But not a professional mechanic in any way?

A No.

Q Did there come a time on April 15, 1977, when the Conways brought their Opel Manta back to Bano Buick for repairs, if you know?

A What is the date on that?

Q April 15. I'll show you. It has been marked Plaintiff's 10, for identification.

MR. MATLIN: The document speaks for itself.

MR. STIX: I'm asking him to use it to refresh his recollection.

A Yes.

Q Did a time come when you discovered, after the fact, why the car was in there?

MR. MATLIN: Did there come a time after April 15, from April 15 to today, when you learned the purpose for which the automobile was brought to Bano Buick?

A Yes.

Q What was that purpose? [15]

MR. MATLIN: Why don't we get to the when?

Q When did you learn it?

A At the time a check was returned.

Q When was that?

A It would be in May, sometime.

Q May of 1977.

A May.

Q In May of 1977, whose job was it to deposit the daily receipts from Service?

A The Bookkeeping Department.

Q If a check was paid to Bano Buick 5:30 in the evening, when would that deposit be placed in the bank?

A The next day.

MR. STIX: Can I see the check that has been marked Plaintiff's 1?

Q I show you what has been marked Plaintiff's 1, for identification, and can you identify it?

A Yes.

Q What is that, sir?

A It is a check for $431.34.

Q That's the check of Jeff and Lynn Conway? [16]

A Yes.

Q It is made payable to Bano Buick, Inc.?

A Yes.

Q Did there come a time when it came to your attention that this check was returned to Bano Buick unpaid?

A Yes.

Q Do you recall, approximately, when that was?

A I would have to look it up. I don't remember. I would say, around ten or fifteen days after the date of the check.

MR. STIX: Can we have what has been marked Plaintiff's 2 and 3, for identification?

Q I show you what has been marked Plaintiff's Exhibit 2, for identification, and ask you if your recognize that?

A Yes, I do.

Q What is that?

A This is the—what would you call it?

MR. MATLIN: A note from the bank.

A (Continuing) Stipulating insufficient funds for Jeff and Lynn Conway.

Q Was that Advice received by you with the check attached to it? [17]

MR. MATLIN: By him personally?

MR. STIX: Well, by Bano Buick.

A Yes.

Q Did that come to your personal attention, at any time?

A Yes.

Q When would that be? If you could look at the Advice, is there a date on the Advice?

A Is that the date I got it back? I don't know. That day when I got it back from the bank and I opened it, I was informed.

Q What, at that time, did you do about it, concerning the check?

A Our norm? We would notify, call the bank, to see if there was an error.

Q Which bank would you call?

A Dry Dock.

Q Did you call Dry Dock Savings Bank?

A The Accounting Department did.

Q Do you know who in the Accounting Department?

A At this time, no, I don't remember.

Q Who was in charge of the Accounting office in May of 1977? [18]

A I think, it was Louise Geidel.

Q Is she still employed by Bano Buick?

A No.

Q Do you know, whether or not she, in fact, did make that call?

A Yes.

Q Did she make any note or memorandum that she made the call?

A No. I stood there when she made the call.

Q Do you know who she spoke to?

A No.

Q As a result of that telephone conversation, what, if anything, did Bano Buick do in relation to this check?

MR. MATLIN: At that time?

A Held it.

Q For how long did you hold it?

A About two more days, three more days.

Q What did you do, at that time?

A We called the bank, again.

Q And did Louise Geidel make that call, again?

A Yes. [19]

Q Do you know who she spoke with?

A No.

Q Did she make any note or memorandum?

A No.

Q Were you with her when she made the call?

A No.

Q You subsequently learned orally that she made the call?

A Yes.

Q What, if anything, did you do with the check after the second phone call?

A She was informed that the money was sufficient funds the second time.

MR. HENSON: I cannot hear you, sir.

A (Continuing) She was informed that there was sufficient funds, the second time we called the bank, to redeposit the check.

Q In fact, did you redeposit the check?

A Yes.

Q Subsequent to that, did Bano Buick, Inc., receive what has been marked Plaintiff's Exhibit 3, for identification?

A Yes. [20]

Q What is that, sir?

A It is a --

MR. MATLIN: The document speaks for itself.

Q Can you identify it?

A Yes.

Q What is it, sir?

MR. MATLIN: What it is, it speaks for itself.

MR. HENSON: He got No. 3 back from the bank?

MR. STIX: That's what I'm trying to find out.

A Yes.

Q Can you tell me, when you got that back?

A Some day after the 26th of May.

Q Did it come to your personal attention?

A No.

MR. MATLIN: When it first came back?

Q Did there come a time when that was placed on your desk?

A Yes.

Q Do you recall, approximately, when that was?

A The day we got it in the mail. I don't know the exact date we got it. [21]

Q Was the check attached to the Advice?

A Yes.

Q What, if anything, did you do, with regard to receiving Plaintiff's Exhibit 1, which is the check attached to Plaintiff's Exhibit 3, for identification? What did you do at that point?

MR. MATLIN: I don't understand the question.

MR. STIX: Withdrawn.

Q What did you do when you received the check back without payment?

MR. MATLIN: In what sense?

Q Did you do anything with the check? Did you take any action with regard to the check?

A I don't follow what you are trying to ask me.

Q What, if anything, did you do with the check? Did you put it in your drawer, give it to someone else?

A Put it in my drawer.

Q Did there come a time, when you gave it to anyone else in Bano Buick for collection?

A No.

Q What was the next action you took in regard to this check? [22]

A I tried to call Jeff Conway.

Q What did you do when you tried to call him?

MR. MATLIN: Put his finger in the telephone. What do you mean?

Q Did you call him on the phone?

A Yes.

Q How did you find out his telephone number?

A I'm sure in the file, more than likely, we have their telephone number.

Q Do you recall what date that was, approximately?

A I'd have to look it up. I don't remember offhand. Somewhere around the end of May or beginning of June.

Q Did you talk to Jeff Conway?

MR. MATLIN: At that time?

MR. STIX: At that time.

A No, I'm sure I never talked with Jeff. It was with Mrs. Conway.

Q Do you recall when that was, approximately?

A No, I don't.

Q You did speak to Mrs. Conway on the phone?

A Yes. [23]

Q Can you tell me what you said to her and what she said to you?

A She said that Jeff would call me back. He was working in real estate, and he was sleeping.

Q Did you tell Lynn Conway that the check was returned for insufficient funds?

A No.

Q Did you tell her the check was returned because it was stop payment order?

A No.

Q Did you tell Lynn Conway why you were calling?

A I wanted to talk to her husband about the car.

Q Did there come a time, when you did speak with Jeff Conway?

A Yes.

Q Do you recall how many days after?

A No.

Q Was it the same day you talked to Lynn Conway?

A No.

Q Was it within a week?

A Yes.

Q Was it on the phone or in person?

A He came down in person. [24]

Q Do you remember what time of day that was?

A No.

Q Did you have a conversation with him?

A Yes, I did.

Q Can you tell me the nature of that conversation?

A It seems, he found out where we bought the motor from and said, that the motor was not as good a motor as he wanted. And for the extra money, he could have bought another one from another car.

Q Did he tell you where he thought you bought the motor from?

A Yes.

Q Where was that?

A Bedford Auto Wreckers.

Q Where did you buy the motor from?

A Bedford Auto Wreckers.

Q Do you know who owns Bedford Auto Wreckers?

A It was—I don't know. I know one was Tom Martabano and I don't know who the partner was.

Q Do you know who on behalf of Bano Buick, Inc., actually made that purchase?

A No.

Q Approximately, at that time, did you have a nephew of college age working for Bano Buick, Inc.? [25]

A I don't –

Q Let me rephrase it. At about the time the engine was purchased, between April and May of 1977, did you have one of your nephews working for Bano Buick who subsequently left to go back to school, in June of 1977, who could have purchased that engine?

A I don't recall.

Q Do you have an invoice receipt for the purchase of that engine?

A No.

Q Did Bano Buick pay cash or by check for that engine?

A I have no idea.

Q Is there any way you would be able to find that out by looking through Bano Buick, Inc.'s records?

A I wouldn't know.

Q Do you know if during that time, Bano Buick bought other parts from Bedford Auto Wreckers?

A No.

MR. MATLIN: No, they didn't, or no, you don't know?

THE WITNESS: No, I don't know. [26]

Q So you don't know whether this was one of many transactions which could have been paid for with other merchandise, do you?

MR. MATLIN: Objection to the form of the question.

Q Do you have any records whatever, for the method of payment to Bedford Auto Wreckers, or a receipt of any sort?

A No.

Q Do you know how much was paid for this engine?

A Not really.

Q Do you know what year that engine was?

A No. I don't.

Q Do you know, whether or not, the engine was tested before it was purchased?

A No, I don't know.

Q Do you know the engine number, block number of the engine?

A No. No, I don't.

Q The day that Jeff Conway came down to speak to you, could you tell me what else he said other than, he knew where you bought the engine from and what you said to him? [27]

A Yes. He told me that he could get—he knew of a car where the motor was already in and running that he could purchase for $100.00 more than the $200.00, which he knew the motor was in good shape.

Q What, if anything, did you say to him?

A I told him if he could get the car, we would be more than pleased to put that motor in that car for him, at no additional charge, and give this motor back to where we purchased it, and give him the $200.00 credit.

Q In April, May of 1977, what did Bano Buick charge customers for labor in the Service Department?

A I don't remember.

MR. MATLIN: On an hourly basis?

MR. STIX: Yes, on an hourly basis.

Q Was the service charged on an hourly basis?

A No, flat rate.

Q What do you mean by, flat rate, flat rate per job?

MR. MATLIN: You are talking about this particular job or in general?

MR. STIX: This particular job.

A It normally takes so many hours to remove and reinstall an engine according to book labor, book time. [28]

Q By book time, you mean the average hourly rate as defined by General Motors?

A By General Motors or Chilton.

Q So, in other words, you would take the book hours and multiply it times a rate?

A Yes.

Q Do you recall what the rate was?

A No.

Q Could you look that up in your records? I'll leave a space in the transcript.

A I'll try.

Q Do you know what the book hours were for replacing this engine?

A No.

Q If I leave a space in the transcript, could you find out what the book hours were and the rate?

A Yes.

Q Do you know what Bano Buick, Inc., did with the engine that was removed from the Conways' car?

A Junked, thrown out.

Q It wasn't sold to an auto wrecker? [29]

A Not that I know of, unless they asked for an exchange or something. No, I don't know.

Q Do you know whether any parts were taken from the engine, before it was discarded?

A I don't know.

Q Was any credit given to the Conways on their bill, for the old engine?

A I don't know. You are talking about this bill now?

Q Yes, this last bill.

A I know what you are saying here. I think they took the head off of this engine and put it on this engine.

Q In other words, took the head off the old engine and put it on the new engine?

A Yes.

Q Do you know who specifically worked on the Conways' car when they changed the engine?

A I would think, Ken Bratco.

Q Do you have the cardboard worksheet for this transaction?

A I don't know.

Q It is not with you today?

A No. [30]

Q Does Bano Buick maintain these worksheets?

A We keep a file of the cardboard with active customers up to about two years, and if unactive we just discard them.

Q So it would be a fair guess, that this was discarded?

A It might have been.

Q Is there any record by payroll which would indicate who worked on this car?

A No.

Q Do you know, whether or not Mr. Conway authorized the work that was done on the car?

A No, I don't know.

Q Is there any document you could look at to find out that information?

A No.

Q Was there any other conversation with Mr. Conway on that date?

MR. MATLIN: Subsequent conversation?

MR. STIX: Well, all in the same conversation, when he was in Bano Buick, Inc.

A I don't know what I finished saying in the beginning. [31]

Q You said he could have gotten a better engine for a little more money, and you indicated to him if he got it, you would put it in at no other charge, and give him a $200.00 credit.

A Yes.

Q Was there any other conversation?

A I said, he would get a hold of the car and bring it back and we would handle it.

Q Did you have any subsequent conversation with Mr. Conway?

A None whatsoever from that time on.

Q With Mrs. Conway?

A Just called to try to get the things paid.

Q You called her at her house?

A Yes.

Q That was after you spoke with Jeff Conway?

A Yes.

Q Can you tell me how many calls there were?

A The exact number, no.

Q Can you tell me the gist of these conversations, what you said to her and what she said to you?

A To try to bring the car down to have it fixed.

Q What did she say? [32]

A She said she will have her husband contact me.

Q Did he ever contact you?

A No.

Q Did there come a time when you took some other action on this check that had not been paid?

A I don't know what the question means.

Q Did you give the check to someone?

A Did I give the check to somebody?

Q Yes. Did you give it to your son to do anything with it, or leave it in the drawer, send it to a collection attorney, what did you do?

A Yes, I called my attorney.

Q Do you remember what date that was?

A No.

Q Who's your attorney?

A Vincent Cerbone.

Q What, if anything, did you say to him and what did he say to you?

A I told him about the checks, the check that came back with the insufficient funds, and told him the whole story. And he said, please come up here and have your son bring it up or you bring it up, and let me review it.

Q Did you indicate to him that you had Advice payment stopped? [33]

A I showed him, yes.

Q What, if anything, did you do next with regard to this check?

A I told him that we tried to contact the customer, and they refused to bring the car or even have us pick up the car to make restitution. And I felt they had no intentions of ever making good on this check.

Q Did he say anything else to you?

A He said, bring the check up.

Q Did you bring the check up?

A My son brought the check up.

Q So you turned it over to your son?

A Yes.

Q Did you have any other conversations with your attorney after that first phone call, concering this matter?

A I don't remember.

Q Would it be fair to say that your son took over the process after that conversation with Mr. Cerbone?

A Yes.

A Yes.

Q Did you ever personally talk to Joseph Shane of the Dry Dock Savings Bank, concerning this check?

[34]

A No.

Q Was Mr. Cerbone the attorney for Bano Buick, prior to this occasion?

A Yes.

Q Was he the attorney that incorporated the business in 1965?

MR. MATLIN: Objection, privileged communication.

Q Are you asserting the privilege now, sir?

MR. MATLIN: Yes.

Q Was Mr. Cerbone, also your personal attorney?

MR. MATLIN: Objection.

MR. STIX: What is the basis of the objection?

MR. MATLIN: What is the difference who his personal attorney was?

MR. STIX: May I see a copy—who is the accusatory instrument copy—who is that for?

Q I am going to ask you the question again, Sir, was Mr. Cerebone your personal attorney, as well as your corporate attorney, during this time?

MR. MATLIN: What is the relevancy?

MR. STIX: It might be relevant to my case. [35]

MR. MATLIN: As to who his personal attorney was?

MR. STIX: Yes.

MR. MATLIN: He could have had ten personal attorneys.

MR. STIX: Yes, but I could also ask him if Mr. Cerbone was one of his attorneys.

A He was one of them.

Q You had more than one personal attorney?

A I don't remember at that time.

Q Was Joseph Cerbone one of your attorneys at that time?

A I don't recall.

Q Had Joseph Cerebone done work for you in the past?

A Personally?

Q Yes.

A No.

Q For Bano Buick, Inc.?

A Not that I recall.

Q Do you know, whether or not there came a time when an accusatory instrument was lodged against Lynn Conway in relation to this check, in the Mount Kisco Justice Court? [36]

MR. MATLIN: As of what date?

MR. STIX: As of June 30, 1977.

A Yes.

Q When did you receive that knowledge?

A Maybe, two, three days after.

Q Did you ever speak to an Assistant District Attorney about this charge?

A No.

Q Did you ever speak to the Mount Kisco Town Prosecutor?

MR. MATLIN: Ever?

MR. STIX: About this charge.

MR. MATLIN: At any time or prior to its being?

Q Prior to the issuance of this charge, did you ever speak to the Mount Kisco Town Prosecutor about this?

A No.

Q Did you ever speak to the local town prosecutor about this charge, after it was instituted?

A No. [37]

Q Did you ever speak to Detective McKenzie about this matter, prior to June 29, 1977?

A No.

Q Did you ever speak to him about it afterwards?

A I don't recall.

Q Did you have any attorney represent you in regard to this criminal action?

MR. MATLIN: Represent him how in this criminal action?

Q Was this a private criminal complaint?

MR. MATLIN: That calls for a legal judgment.

Q Was the District Attorney representing the People of the State of New York in this matter?

A I don't know.

Q Do you know who represented the People of the State of New York in this matter?

A No, I don't.

MR. MATLIN: When you say who—

Q What entity, the District Attorney, the local attorney prosecutor, or yourself?

A No.

Q Did you ever hire Charles Martabano to go with you to court in regards to this matter, while this was pending? [38]

MR. MATLIN: While the criminal procedure was pending?

MR. STIX: Yes.

A I don't remember.

MR. MATLIN: I don't understand the question. To go to court—

MR. STIX: Withdrawn.

Q Did you ever appear in the Mount Kisco District Court in the action of the People of New York against Lynn Conway? Were you ever personally in court?

A As a bystander?

Q For any reason.

A Yes.

Q Did you ever go with an attorney?

A No.

Q Did you ever send an attorney to appear for you in the action, People of the State of New York against Lynn Conway?

THE WITNESS: I don't know what he is talking about.

Q If you don't understand, just tell me. While this charge was pending against Lynn Conway in the Mount Kisco Justice Court, did you ever retain Charles Martabano to go to the court on the night this was on the calendar? [39]

MR MATLIN: At any time?

MR. STIX: At any time.

A I don't know.

Q So it is your statement, that you never hired an attorney?

MR MATLIN: The statement is, he doesn't know.

Q Did you ever hire an attorney, specifically to look after your interests in the People of the State of New York versus Lynn Conway, in the criminal matter?

A I don't understand the question.

Q Do you know--

MR. MATLIN: I don't understand the question, either.

Q Do you know Charles Martabano?

A Yes.

Q Is he an attorney?

A Yes.

Q Has he ever done work for you as a lawyer, during the time that the action, The People of the State of New York against Lynn Conway, was pending in the Mount Kisco Justice court? [40]

MR. MATLIN: Any kind of work?

A In what year?

Q Between 1977 and 1979.

A I don't remember.

Q Do you know, whether or not Charles Martabano appeared for you in the criminal action, The People of the State of New York against Lynn Conway, on or about September 13, 1979?

A Again, I cannot give you that answer. I don't know when he became a lawyer. When he became a lawyer, then he started handling.

MR. MATLIN: When you say, when he became a lawyer, when he was admitted to practice?

THE WITNESS: When he was admitted to practice.

Q Just refresh my memory, you don't recall what date it was when you talked to Mr. Conway in your office at Bano Buick, Inc.?

MR. MATLIN: I believe he said, it was in June. [41]

Q Subsequent to that, can you tell me how many times you spoke with Mrs. Conway?

A I could look it up.

Q You have it written down somewhere?

A Yes.

Q If we leave the dates open--can you look at that now?

A I don't know if we have all of them here. Some of the phone calls which I had written down and told the attorney, Charles Martabano, are listed here.

Q You told this to Cha[illegible] Martabano?

A Yes. Do you want the dates?

Q Please.

A May 31, June 1, June 3, June 6, June 14, June 20, June 21.

MR. HENSON: What are these conversations, with whom?

MR. MATLIN: Dates of telephone calls.

THE WITNESS: That I either sometimes got hold of Mrs. Conway or no answer.

Q Do you know, whether or not, you spoke with either of the Conways on May 31, 1977?

A I didn't get that question. [42]

Q Did you speak with anyone on that date, or was there no answer?

MR. MATLIN: If you know.

A I don't know.

Q Do you have any document that would have that written down?

A In the office, maybe.

Q If we leave a blank in the transcript, will you fill in who you spoke to on that date, if anyone, or if there was no answer, and the nature of the conversation.

A _____

The only time there was no answer was June 3, because the time was unrecorded.

Q You have the times, also?

A Yes.

Q What time did you make the phone call on May 31, 1977?

A 10:30 a.m.

Q There is nothing listed as to who you spoke with?

A I only spoke with Mrs. Conway. All the time, I spoke with Mrs. Conway. [43]

MR. MATLIN: He said, in the telephone conversations when he reached the Conways, he only spoke with Mrs. Conway.

Q This would be the call you said where she said her husband would take care of it?

MR. MATLIN: He doesn't know.

Q Do you recall what she said on May 31, 1977?

MR. MATLIN: He doesn't know if he reached someone.

MR. STIX: He said the only date he didn't reach someone was June 3.

Q Did you reach anyone on May 31, 1977?

A I don't know.

Q Did you reach anyone on June 1st, 1977?

A It doesn't stipulate it here. There's only one time that the time is unrecorded.

Q What time was the call on June 1st made?

A 8:30.

MR. MATLIN: A.M.?

THE WITNESS: A.M.

Q June 3, what time was the call made?

A It is not recorded. [44]

Q Do you know if you spoke to anyone on that date?

A No, I don't know.

Q On June 6, 1977?

A 9:10 a.m.

Q Did you speak with Mrs. Conway on that date?

A I don't remember.

Q On June 14, 1977?

A 5:20 p.m.

Q Did you speak with her?

A I don't know.

Q On June 20, 1977, what time was that phone call?

A 9:15 a.m.

Q Did you speak with Mrs. Conway?

A On that specific date, I don't know.

Q On June 21, 1977?

A It was 9:30 a.m.

Q Did you speak with her?

A I don't remember.

Q Do y[illegible] in your office--you said you had a document that might be able to supply that information, as far as to whether or not you reached Mrs. Conway and what you said to her and what she said to you?

A I only dock the time I make the calls. [45]

Q When you talked to Mr. Cerbone, you stated in your answer that he advised you that what you told him constituted a violation of the Penal Law.

MR. MATLIN: Objection, that's not what he stated at all. He said he gave the papers to his son. I believe he said, you or your son should bring the papers in.

MR. STIX: May I see the original of the Answers?

Q I ask you to look at this document and tell me, if you recognize it.

A Yes. If that is the lawsuit, yes.

Q I ask you if that is your signature on the verifications?

A Here?

Q No. That's you son's?

A Yes.

Q Have you ever read that document before?

A I have read it, yes.

Q Was this document prepared on your behalf on this litigation for use in this lawsuit?

A Not for me personally, no.

Q For Bano Buick, Inc.? [46]

MR. MATLIN: It was prepared for all of the defendants that I represent.

Q I ask you to just look at this first sentence here on Page 3.

MR. MATLIN: I think it said, defendants were advised by their attorney. We'll stipulate to what it says.

MR. STIX: That's exactly what my question was.

Q Did Vincent Cerbone advise you that under the circumstances that you recited to him, that the check that was returned constituted a violation of the Penal Law?

MR. MATLIN: We will object to the form of the question.

Q What, if anything, did Mr. Cerbone tell you after you told him about the circumstances involving this check?

A Send the papers up to the attorney and he would look at it.

Q Did he ever tell you it was a violation of the Penal Law?

MR. MATLIN: Tell you personally.

A No. [47]

Q Do you know how many miles were on the engine that was put into Mr. Conway's automobile?

A No, I don't know.

Q At anytime during the criminal prosecution, did you ask Vincent Cerbone to disqualify himself from the case?

MR. MATLIN: You personally.

A No.

MR. STIX: I have no further questions.

MR. HENSON: I have no questions.

MR. MATLIN: I have no questions, either.

Alfred Martabano

Subscribed and sworn to
before me this day
of , 1981.

...

ALFRED V. MARTABANO, a Defendant herein, having first been duly sworn by Sharon Kronenberg, a Notary Public of the State of New York, was examined and testified as follows: [48]

EXAMINATION BY

MR. STIX:

Q What is your name?

A Alfred V. Martabano.

Q Where do you live?

A 193 Main Street, Mount Kisco, New York.

Q Were you employed between January, 1977 and June of 1977?

A Was I employed?

Q Yes.

A Yes.

Q By whom were you employed?

A Bano Buick.

Q Were are they located?

A 193 Main Street, Mount Kisco.

Q What was your position?

A Vice President, General Manager.

Q What were you the general manager of, any specific organization?

A Everything.

Q Were you also a director of the company?

A No.

Q In your duties as a general manager, did you oversee the Service Department? [49]

A I would oversee the manager of the Service Department, not oversee the actual work of the Service Department.

Q Who was the manager of the Service Department in January of 1977?

A I don't know.

Q Do you have any records that you could look that information up and supply it to me?

A We probably have employment records.

Q If I leave a blank in the transcript, will you fill it in?

A Yes.

Q Do you know who the service manager was in April of 1977?

A No.

Q You could find that information, also, if we leave a blank, and fill it in?

A Right.

Q Do you recall, whether or not, between April 15 and the middle of May, 1977, you had a cousin working for you at Bano Buick, Inc., who was of college age and left in the end of May to go back to school? Does that ring a bell? [50]

A If you tell me the name, maybe, but I don't know.

Q I don't know the name.

A I don't know.

Q There was a mechanic working for you named Ken Bratco, during 1977?

A Well, he was employed. I would have to assume it is in those dates, yes.

Q He is no longer employed?

A Right.

Q Did there come a time in January of 1977, when the Conways brought their 1973 Opel Manta to Bano Buick, Inc. Service Department, that you know of?

A I never knew that until five minutes ago when you showed that to my father.

Q Do you know, whether or not, the Conways brought that same automobile in to be serviced in April, 1977?

A After the fact, I knew it.

Q When did you learn that the car was in? [51]

A After I heard about the bounced check.

Q But you didn't know about it until that time?

A No.

Q Do you know where, in April of 1977, Bano Buick, Inc. purchased its used spare parts, or replacement parts?

A I could name a few places where we would purchase them.

Q Could you tell me where they were, where these places were?

A Where they were?

Q Who they were?

A I would say, varous salvage yards, used part dealers for used parts.

Q One of them was Bedford Auto Wreckers?

A Right.

Q Do you know, whether or not an engine was placed in the Conways' Opel Manta at Bano Buick?

A Again, after the fact, when I saw the repair order.

Q Do you know now where that engine was purchased?

A Yes. [52]

Q Where was that purchased?

A I was told it was from Bedford Auto Wreckers.

Q Do you know the year of that engine?

A No.

Q Do you know the block number of that engine?

A No.

Q Do you know how many miles were on that engine?

A No.

Q Do you know what the cost of that engine was to Bano Buick, Inc.?

A I really don't know.

Q Do you know whether that was paid for by cash or by check?

A No.

A No.

Q Is there any way of determining now that information?

A Is there any way? I don't know if we would have that on file, something that far back.

Q Do you know prior to having that engine, purchasing that engine, whether anyone from Bano Buick, Inc., tested the engine or inspected it?

A In this specific case, I don't know, because the engine won't run until they put it together in the car. You cannot check a free standing engine. [53]

Q Do you know, whether or not, they checked it after it was in the car, in this case?

A They had to.

Q But do you know who would have done that, who did that?

A The mechanic that worked on the car would have.

Q Do you have any record to indicate who that mechanic was?

A No, because a job that size might have been two or three people.

Q But there are no records of who worked on what car?

A I would say, no.

Q Were any of the mechanics employed by Bano Buick in April of 1977, still employed by Bano Buick?

A Are any of them? There is a possibility that one.

Q Who would that be?

A I would say, Ray Hoffman, however, I don't know the exact date. We have split the department, a new car and a regular service department. I think he was in the used car department and later promoted to a mechanic. [54]

Q Do you know what was done with the engine taken out of the Conways' automobile?

A No.

Q Does Bano Buick, Inc. sell old parts to salvage yards?

A I would say, not sell.

Q They just come and collect salvage?

A To me, what I would think is normal procedure is, they usually trade. If you have to give some replacement back, whatever.

Q Is that the standard in the industry?

A Depends on the type of part.

Q For an engine?

A In this case, I don't know. Some yards would take it back for the weight, for scrap weight.

Q Do you know, whether or not, the Conways ever authorized this repair?

A I don't know.

Q Is there any way of checking?

A Not that I know of.

Q In the Service Department, are customers charged for the actual labor hours or the book hours? [55]

A Either.

Q Do you know whether the Conways were charged by the book hour or the actual hours?

A Can I see the repair order?

Q Sure, it is Plaintiff's 10, for identification.

A In this particular billing, I would say it was a negotiated price.

Q What is the basis of that assumption?

A A round number. It would be hard to say that a certain hourly rate multiplied by a certain charge came out to an even number.

Q Who in April of 1977 had the authority to negotiate a rate like that?

A The service manger. Well, the service manger would make the decision, although a service writer may have told them the price.

Q So the price would have been established before the engine was purchased or the work done?

A Yes, before they went out and bought the used motor, yes.

Q Did you ever have any conversation with Jeff Conway or Lynn Conway – [56]

A No.

Q – either during the time the car was in your shop or later?

A Never.

Q Did there come a time when you were made aware that the Conway check was returned to Bano Buick, Inc., without being paid? That it was a bad check?

A Did there come a time? Yes.

Q Do you remember, approximately, when that was?

A I don't remember. It would be based on the day it ws returned by our bank.

Q I show you what has been marked Plaintiff's Exhibit 2 and 3, for identification, and these are the Advices that were sent with the check by the bank.

A Yes.

Q Who presented these documents to you?

A Who presented them to me?

Q Did your father?

A My father showed them to me.

Q He showed them both to you, do you recall?

A I believe, yes.

Q What did he say to you when he gave you those documents? Did he tell you to do anything with the check and the Advices? [57]

A When we had them both, after the time which is almost a month later of him trying to contact them, I was told to go and see the attorney, yes.

Q He gave you both the check and both Advices?

A Yes.

Q What, if anything, did you do with them?

A I took them to Vinnie Cerbone.

Q Where is his office?

A It is Mount Kisco. I don't know the address.

MR. MATLIN: Smith Avenue.

Q Did you see Mr. Cerbone about that?

A Yes.

Q Did you present the documents to him?

A Yes.

Q What, if anything, did he say to you?

A He said the check and these notices — and he said that the first return notice for insufficient funds is a criminal whatever. And that the second had no bearing upon it, because it is an action after the fact. It was insufficient to start with.

Q Did he give you any advice as to what to do with this situation? [58]

A He told me to take it to the Police Department, they would handle it.

Q What did you do next?

A Well, I would say, I don't know if it was the same day I went to the police station, but that evening or the next evening, whatever, I went down to the police station. I had called down there to make sure they were there and I brought it down.

Q Had you ever brought a bad check into the Mount Kisco Police before?

A I don't know if I personally have brought one down.

Q Do you know if anybody on behalf of Bano Buick, Inc., had brought one down for checks, to the police?

A I know of one other check.

Q From Bano Buick?

A Right, a check made to Bano Buick.

Q You had a conversation with Detective McKenzie?

A On this item, yes.

Q What did you say to him and what did he say to you?

A I told him, explained the situation, told him I had just spoken to my attorney, and what his advice was. That I should press charges for insufficient funds, because the people weren't going to pay. [59]

Q What did he say to you?

A He said, that to do it, I would have to fill in or sign an arrest warrant document, and did I want to do that. And I said, that's what the attorney said. And he said, hold off. I'll make a call and come back tomorrow. And if that's it, that's it. And you will have to sign it.

Q Did you come back the next day?

A I believe, it was the next day.

Q What, if anything, did he do?

A He said he made a call and they weren't interested in paying it, and sign the arrest thing.

Q Did you take any other action in regard to this matter?

A Did I?

Q Yes.

A No.

Q Did you ever appear in court on the criminal action, Mount Kisco Justice Court?

A If I was in a courtroom many weeks, did I appear or get called up? No. [60]

Q You were just there as an observer?

MR. HENSON: You are using a word, appear, and I suggest that that is a word that we use which is a little unclear.

Q Were you in the courtroom, at any time, during the action, The People of the State of New York against Lynn Conway?

A I was in the courtroom.

Q Did you ever go up to the bench and make a statement about this matter?

A The thing was never called, because they never showed or you never showed.

Q Did you ever go up?

A Did I ever go up?

Q Yes, to the bench.

MR. HENSON: He answered, it was never called.

Q Can you tell me what days you were in court for this?

A I couldn't tell you.

Q Do you know, whether or not, when you were at Vincent Cerbone's office, he ever called the Dry Dock Savings Bank? [61]

A That he called?

Q Yes.

A Not that I know of.

Q Do you know if he made any investigations about the background of the first notice?

A I do not know.

Q Do you know, whether or not, Detective McKenzie ever called the Dry Dock Savings Bank in this matter?

A Only from him telling me. I wasn't there.

Q Do you know, whether or not, Detective McKenzie ever made a call to the Dry Dock Savings Bank?

A No, he never said that.

Q Did you ever call Dry Dock Savings Bank?

A Me, no.

Q Do you know, whether or not, your father called Dry Dock Savings Bank?

A He told me no, he did not.

Q Do you know, whether anyone on behalf of Bano Buick called Dry Dock Savings Bank?

A I was told that the office manager called.

Q Who is that?

A At that time, I think it was Louise Geidel.

Q Did you ever speak to the Westchester County District Attorney or the local prosecutor of Mount Kisco, about this matter? [61a

A No.

MR. STIX: I have no further questions. Thank you.

• • •

Alfred V. Martabano

Subscribed and sworn to
before me this day
of , 1981.

STATE OF NEW YORK)
) ss.
COUNTY OF ROCKLAND) [62]

I, Sharon Kronenberg, a Shorthand Reporter and Notary Public within and for the State of New York, do hereby certify:

That ALFRED MARTABANO and ALFRED V. MARTABANO, the witnesses whose examinations are hereinbefore set forth, were duly sworn by me and that the transcript of said examinations is a true record of the testimony given by the witnesses.

I further certify that I am not related to any of the parties to this action by blood or marriage and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this day of April, 1981.

Sharon Kronenberg
Shorthand Reporter

EXHIBITS [63]

Plaintiff's	Description	For Ident.
9	Bano Buick, Inc. bill dated 1/4/77.	11
10	Bano Buick, Inc. bill dated 4/15/77.	11

EXHIBIT B

SUPREME COURT OF THE STATE OF NEW YORK [1]
COUNTY OF WESTCHESTER

(SAME CAPTION)

March 3, 1981
10:30 o'clock a.m.

EXAMINATION BEFORE TRIAL of the Defendant, LARRY McKENZIE, pursuant to Court Order of the Hon. George Beisheim, Jr., dated January 16, 1981, at the Westchester County Courthouse, 111 Grove Street, White Plains, New York, on March 3, 1981 at 10:30 a.m., before a Notary Public of the State of New York.

APPEARANCES: [2]

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Mount Kisco, New York 10549

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IT IS HEREBY STIPULATED AND AGREED by an between counsel for the respective parties hereto that all rights provided by the C.P.L.R., including the right to object to any question, except as to the form, or to move to strike any testimony at this examination, are reserved; and, in addition, the failure to object to any question or to move to strike any testimony at this examination shall not be a bar or waiver to make such motion at, and it is reserved for, the trial of this action.

IT IS FURTHER STIPULATED AND AGREED that this examination may be sworn to, by the witness being examined, before a Notary Public other than the Notary Public before whom the examination was begun; but the failure to do so, or to return the original of this examination to counsel, shall not be deemed a waiver of the rights provided by Rules 3116 and 3117 of the C.P.L.R. and shall be controlled thereby. [3]

The filing and certification of the original of this examination is waived.

IT IS FURTHER STIPULATED AND AGREED between the attorneys for the respective parties hereto that a copy of this examination shall be furnished to the attorneys for the witness being examined, without charge.

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LARRY MCKENZIE, a Defendant herein, having been first duly sworn by Sharon Kronenberg, a Notary Public of the State of New York, was examined and testified as follows:

EXAMINATION BY

MR. STIX:

Q What is your name?

[4]

A Larry McKenzie.

Q Where do you live?

A 1603 Park Street, Peekskill, New York

Q Mr. McKenzie, can you tell me what your occupation is?

A I work for the Mount Kisco Police Department.

Q How long have you been employed by them?

A Twelve and a half years.

Q What is your professional address? What is the address of the police department in Mount Kisco?

A 104 Main Street.

Q Can you tell me when you were first employed? What year was that?

A August 25, 1968.

Q What rank were you when you were first employed?

A Patrolman.

MR. HENSON: We have the stipulations here, except as to amenities and privileges of law and relevancy, usual stipulations as to filing, signature. Is that satisfactory to you?

MR. MATLIN: Yes.

Q Did there come atime when your rank was upgraded or changed?

A Yes, it was. [5]

Q When was that, sir?

A I think it was 1974.

Q What were you promoted to?

A Detective.

Q Do detectives have badge numbers?

A Yes, they do.

Q What is your badge number?

A Badge No. 40.

Q Was your badge number the same on or about June 1st, 1977?

A Yes.

Q Was that the badge number you wore when you joined the police force?

A No.

Q What was your badge number as a patrolman?

A 209.

Q That would be a patrolman's badge?

A Yes.

Q 40 would be a detective's badge?

A Yes.

Q Were you so employed as detective, in June of 1977, for the Mount Kisco Police Department?

A Yes, I was. [6]

Q What was your assignment as detective in June of 1977?

A I was assigned the 4 to 12.

Q Is that 4 p.m. to 12 midnight?

A Right.

Q Would that be the whole month of June?

A No.

MR. STIX: I will withdraw my last question.

Q On or about June 28, 1977, what tour of duty were you working?

A 4 to 12.

Q What were your duties during that shift?

A Investigation.

Q Would those be investigations of pending matters or new matters?

A Both.

Q Can you tell me what the procedure is, when a new matter is turned over to you for investigation?

MR. HENSON: That is much too broad a question.

MR. STIX: I will rephrase it. [7]

Q On June 28, 1977, can you tell me what you did when a new complaint was delivered to you for investigation?

A What complaint are your referring to?

Q Any complaint.

A There are several procedures we use.

MR. HENSON: Are we talking about a complaint involving a check?

Q Say a bad check, a check case. What would your standard operating procedure be?

A It would be to record the complaint, or it depends on what the complainant wanted to do with the check.

Q Would you interview the complainant?

A Yes.

Q Would that interview be in your office?

A Yes.

Q That would be the detective's room?

A Right.

Q Would you ask him a set of questions based on a prepared list?

A No.

Q So the first thing you would do would be to interview the complainant? [8]

A Right.

Q What type of questions would you ask him?

A If it's in reference to a check, I usually ask if they are interested in getting their money, or interested in prosecuting.

Q What else do you ask them?

A I usually ask them – tell them, that if they are going to prosecute, they will have to sign the Information, if it is a private complaint.

Q If they say they want to prosecute, you say they must file an Information?

A Right.

Q And you indicated it would be a private complaint?

A Right.

Q What is a private complaint?

A There has been a policy in our department, if it is involving checks, and the amount is less than a felony, usually we let the party sign the complaints, the complainant.

Q Who prosecutes these complaints?

A The court does. [9]

Q Who handles it? The local Justice Court would hear the complaint?

A Yes.

Q Who would prosecute the complaint?

MR. HENSON: As of what date?

MR. STIX: As of June 28, 1977.

A The local prosecutor.

MR. HENSON: If you know.

A (Continuing) As far as I know, local prosecutor.

Q Do you know who the local prosecutor was on June 28, 1977?

A I don't remember.

Q Would it be the District Attorney who was to do those complaints on that day?

A I don't think so.

Q Assuming the complainant indicated a preference to prosecute the case, what would the next step be?

MR. HENSON: I am going to object to that.

MR. STIX: On what grounds?

MR. HENSON: I think it is too broad. You are asking him an assumption of facts.

Q What were the standard operating procedures after the complainant indicated that they wanted to prosecute a criminal complaint or a bad check? [10]

A I explained to you, that they are required to sign Information.

Q Do you ask them any questions while you are preparing the complaint?

A No, I don't ask any questions.

Q Do you ask a statement of facts?

A I just ask for a statement of facts in the Information, and they sign after reading it.

Q You prepare the actual instrument?

A Yes.

Q If they say they are interested in getting their money back, what do you do?

A As a matter of courtesy, I ask if they would mind if I make a phone call, in case there is a mistake in issuing the check.

Q On some time on or about June 28, 1977, did in fact some individual come to you concerning a check case?

A Yes.

Q Who was that individual?

A Alfred Martabano. [11]

MR. MARTIN: Can we have Mr. Martabano identified?

Q Do you see this individual here?

A Yes.

Q Which gentleman?

A The one in the brown suit.

Q Is that Mr. Martabano, Jr.?

MR. MATLIN: There is no such person as Alfred Martabano, Jr.

MR. STIX: What is your full name?

MR. MARTABANO: Alfred V. Martabano.

Q Can you tell me, approximately, what time you saw Mr. Martabano on this date?

A A little after 4.

Q He was there personally in the Mount Kisco Police Department?

A Yes, he was.

Q You had a conversation with him, did you not?

A He brought a check to me.

Q Did he show you the check?

A Yes, he did.

Q Do you have the check with you today?

MR. MATLIN: Yes.

MR. STIX: Can I see it, please? Do we have the original check? [12]

MR. MATLIN: We have the original check.

MR. HENSON: The original check is not with the Village?

MR. MATLIN: No, I think it is with us.

MR. STIX: Can we have this marked, Plaintiff's 1, for identification.

(Whereupon Dry Dock Savings Bank Check No. 154, Account No. 2260 7033 022840018 4 0154, was marked Plaintiff's Exhibit No. 1, for identification.)

Q Detective, I show you what has been marked Plaintiff's 1, for identification, and ask you if you recognize it.

A Yes.

Q Can you tell us what that item is?

A It is a check.

Q Is that the check that Alfred V. Martabano presented to you in support of his complaint, on or about June 28, 1977?

A Yes, it is.

Q When he so presented it on June 28, 1977, did it have the letters next to, Pay to the Order of, that's in red — that's in blue ink? [13]

MR. HENSON: If you know.

A To be honest with you, I didn't pay that much attention. I guess it was in, it is on the photostat copy. I don't remember that.

Q Did you put that there?

A No, I did not.

Q Do you know who put that writing there?

A I have no idea.

Q Did Mr. Martabano show you any other documents, when he brought the check to you, any bank advices?

A Yes, he did.

MR. STIX: Mark this Plaintiff's 2, for identification.

(Whereupon a Bank Advice dated 5/18/77, was marked Plaintiff's Exhibit No. 2, for identification.)

MR. STIX: I'd like to mark this, Plaintiff's 3, for identification.

(Whereupon a Bank Advice dated 5/26/77, was marked Plaintiff's Exhibit No. 3, for identification.) [14]

Q Detective, I show you what has been marked Plaintiff's 2, for identification, and ask you whether Alfred V. Martabano presented that document to you on or about June 28, 1977?

A Yes.

Q I show you what has been marked Plaintiff's Exhibit 3, for identification, and ask you if you recognize that document?

A I never saw this one before.

Q That document was never presented to you —

A No.

Q —on June 28, 1977?

A I have never seen this before.

Q So you cannot identify that?

A No, I cannot.

Q When Mr. Martabano came to you to file the complaint on June 28, 1977, and he showed you what has been marked Plaintiff's 1, for identification, and Plaintiff's 2, for identification, did you interview him at that time?

A You mean the check and the notice?

Q Yes, the check and the notice.

A Yes. [15]

Q Can you tell me the gist of your conversation with Mr. Martabano?

MR. HENSON: I think he has already given you that.

MR. STIX: I don't think so. I asked him a general question before.

Q Can you tell me what you said to him and what he said to you?

A Upon the presentation of the check, I asked him if he wanted to sign an Information for prosecution or in fact, if it would be okay that I make a phone call in case the check was issued in error, and was a mistake. At that time, he told me it didn't matter.

Q Was that the extent of the conversation?

A That was the extent of the conversation. I told him I would get back to him after I make the phone call.

Q Did anything else take place at that time, as far as filling out a complaint or an Information sheet?

A No.

Q Did you have an interview sheet or in-take sheet or any record or report of this initial meeting?

A No. [16]

Q Did you keep the check which has been marked Plaintiff's 1, for identification, and the bank notice which is Plaintiff's 2, for identification, in your possession after Mr. Martabano left?

A Yes, I did.

Q Where did you maintain them?

A In the office.

Q Did you open a file for this case —

A Yes, I did.

Q — at that time?

A With my notes and whatever. When the secretary came in the next day, or that evening — no, the next day, I gave her the check to make copies of it.

Q Did there come a time when you made a phone call to the Conway residence?

A Yes, I did.

Q Between the time that Mr. Martbano came to your office, and the time you made the phone call, did you make any notes or memorandums concerning this matter?

A No.

Q How did you learn the Conways' telephone number?

A In the telephone directory. [17]

Q What time did you place the call?

A Between 6 and 7 that evening.

MR. HENSON: What date?

THE WITNESS: That's a good question. I don't know whether that evening or the next day.

Q Either June 28 or June 29, 1977.

A Right.

Q Was there any answer?

A Yes.

Q Who did you speak to?

A I spoke to someone who identified herself as Mrs. Conway.

Q What did you say to her and what did she say to you?

A I said I had a check from Bano Buick, in the amount of $431.00, and if in fact there was an error, she should contact the agency and get it straightened out. And she advised me she would.

Q Did you say you were a police officer?

A Yes.

Q Was that the extent of the conversation?

A Yes. [18]

Q Are you sure of the time you called?

A It was that evening, before I went out to lunch.

Q Would it in fact refresh your recollection, if I told you it was 11:00 at night?

A No, I never called that late for a check.

Q You're sure?

A Positive.

Q Did you tell Lynn Conway at that conversation, that if the check was not paid she would be arrested?

A I told her she would be subject to an arrest if there was an Information signed against her.

Q So you told her she would be subject to criminal prosecution?

A She would be subject to an arrest if there was an Information signed against her.

Q Did you tell here she would arrested if she did not make payments?

A I told her she would be arrested if the complainant signed a complaint against her.

Q What, if anything, did she respond to that?

A She told me she'd take care of it.

Q Was that the whole conversation?

A Yes. [19]

Q Did you ever call Lynn Conway again on this matter?

A No.

Q Did you ever make any other calls to the Conway residence about this matter?

A No, I did not.

Q Subsequent to the phone call from Lynn Conway, did you make any –

MR. HENSON: I don't think there is anything on the record –

MR. STIX: Withdrawn,

Q Subsequent to the call to Lynn Conway, did you make any notes or report concerning the phone call?

A No, I did not.

Q So to this point, there is nothing in writing?

A Correct.

MR. HENSON: Wait a minute. You've got a check.

Q As far as the police report is concerned –

MR. HENSON: No, you've got exhibits 1 and 2. I'm not going to let you cross-examine him.

Q Did you have any police notes, reports, memoranda, in your file that you prepared concerning this matter, subsequent to your phone call with Lynn Conway? [20]

A I reported to the Chief about my investigation.

Q You make that report orally or in writing?

A In writing.

Q Do you have a copy of that with you?

A No.

Q Is this particular report maintained by the Mount Kisco Police?

A Yes.

Q You don't have it with you today?

A No.

MR. HENSON: This report was written up subsequently, I believe, isn't that correct?

THE WITNESS: We write them up after an investigation.

MR. HENSON: After the whole thing is completed?

THE WITNESS: Yes.

Q When you say you write these reports up after the investigation is completed, at what point is the investigation deemed completed? [21]

A After the arrest.

Q So there is nothing is writing until subsequent to the arrest?

A Other than my notes I keep on my desk, which after I make out my report, I throw away. On a pad just like you have there.

Q So at this point, at the time you called Lynn Conway, did you have any of your own scratch notes?

A I probably had a telephone number on a pad or something.

Q After you talked to Lynn Conway, what, if anything, did you do about this matter?

A Shortly after, I went to lunch. I came back and the Sergeant advised me I had a phone call from a Mrs. Conway.

MR. MATLIN: If I may, when you are using the word, lunch, you are talking about a particular meal that you have, but not in the normal context that civilians have lunch in terms of the hour of the day, is that correct?

THE WITNESS: Yes.

MR. MATLIN: That would be, about what time of the day? [22]

THE WITNESS: Between 7 and 8 p.m.

Q The Sergeant indicated to you you had a phone call from Lynn Conway?

A Yes.

Q Do you known which Sergeant?

A Sergeant Dunnigan.

Q What, if anything, did you do?

A I accepted the phone call.

Q She was on the phone at that point?

A Yes.

Q Can you tell me the gist of the conversation, what you said to her and what she said to you?

A To be honest with you, I didn't have a chance to say anything. She said she was advised by an attorney that I should not harass her over the telephone.

Q What else did she say?

A That she had been advised by an attorney that I should not interfere with the transaction of a check. It was none of my business. And at that point, I terminated the conversation.

Q Was this phone call on June 29, 1977?

MR. HENSON: I believe he's already answered that. He doesn't know whether it was the 28th or the 29th. [23]

MR. STIX: That was about the first conversation. I am asking about the second conversation.

MR. HENSON: He said, it was the same evening.

Q When Lynn Conway called you, do you know the date of that conversation?

A I'm not sure. Either the 28th or 29th, I'm not sure.

Q Do you have anything in your notes that will refresh your memory?

A It was either Tuesday or Wednesday, probably Wednesday. I'm not sure.

Q Did you just look at something at would refresh your memory on that?

A I looked at the arrest report. That was on Thursday the 30th.

Q What, if anything, did you do after you had this second telephone conversation with Lynn Conway?

A At that point, I called the Bano Buick, and advised him that it was indicated to me they weren't going to take care of the check, and they could do what they wanted. [24]

Q Who did you speak to?

A Alfred, I think.

Q Alfred V. Martabano?

A Yes.

Q Do you know if he worked for Bano Buick?

A Yes, he did.

Q Did you know that on June 29, 1977?

A I knew that in 1968.

Q What was his position, do you know?

A As far as I know, he's the manager, assistant manager, whatever.

Q What did he say he was interested in doing concerning this check?

A When he got a chance, he'd come down and sign Information.

Q In fact, did you prepare an Information?

A After he came there, yes.

Q When did he come down?

A He came down on the Wednesday, I think it was, Wednesday the 29th.

Q June 29, 1977? [25]

A Right.

Q Did you prepare the Criminal Information based on facts supplied to you by Alfred V. Martabano?

A On the basis of the chedk.

Q Was he present when you prepared it?

A Yes, he was.

Q Did he sign it?

A Yes, he did.

Q Did he sign it in your presence?

A Yes.

Q Do you have any personal knowledge concerning the background of this check, other than what you've told us?

A No.

Q Can I see that document?

MR. HENSON: No, not at this point. You can ask the appropriate questions, then I will consider it.

MR. STIX: I'd like to have this marked for identification right now. What is your objection?

MR. HENSON: I want to know the basis upon which you want to ask questions. [26]

MR. STIX: Was this ultimately served upon Lynn Conway?

MR. HENSON: Why don't you ask him, if he signed this instrument, because this was the instrument that was signed.

Q Did you sign this instrument?

MR. STIX: He just said this was signed by Mr. Martabano. Please mark this for identification.

(Whereupon a Criminal Information, dated June 29, 1977, was marked Plaintiff's Exhibit No. 4 for identification.)

Q Detective, I show you what has been marked Plaintiff's 4, for identification, and ask you if you recognize it?

A Yes, I do.

Q What is that?

A That's an accusatory instrument for a misdemeanor or complaint.

Q This is the misdemeanor complaint charging Lynn Conway with the violation of a specific section of the Penal Law?

A Yes. [27]

Q Did you say Alfred V. Martabano put his signature there?

A Yes.

Q Was there anyone else in the room when he did so?

A I brought him up front to the Desk Sergeant, and it was signed in front of both of us.

Q Was any other document prepared at the same time this misdemeanor complaint –

MR. MATLIN: Can we identify the Desk Sergeant?

THE WITNESS: Sergeant Dunnigan.

Q Was any other instrument prepared at the same time this misdemeanor was prepared?

A There was one after.

Q What, if anything, did Mr. Martabano do after he signed there, what has been marked Plaintiff's Exhibit 4?

A He left the office.

MR. HENSON: He wouldn't know.

Q As far as you know.

A He left the office.

Q Did you have any further conversation with him?

A No. [28]

Q Did he ask you what the next procedure was, what the next step was?

A I told him I'd let him know when to appear in court.

Q What did you do with Plaintiff's Exhibit 4, for identification, after Mr. Martabano left? What action, if anything, did you take in regard to that matter?

A What do you mean?

Q Where did you put the misdemeanor or complaint?

A Back to my office.

Q What did you do with it in your office?

A I typed up a warrant.

Q What type of warrant?

A An arrest warrant.

Q Can I see that document, please, if you have it?

MR. HENSON: Mark this for identification, please.

(Whereupon a Warrant of Arrest, dated June 30, 1977, was marked Plaintiff's Exhibit No. 5, for identification.)

Q Detective, do you remember, approximately, what time of the day or evening it was that Mr. Martabano signed the misdemeanor or complaint? [29]

A What time of day?

Q Yes, if you know.

A It was that evening. I don't remember exactly what time. In the evening of the 29th. I don't know exactly what time.

Q Early evening or late evening, if you know?

A It was after I came in at 4:00.

Q I show you what has been marked Plaintiff's 5, for identification, and ask you to identify that, please.

A It is an arrest warrant that I typed up.

Q Who is the subject of that arrest warrant?

A Mrs. Conway.

Q Can you tell me what time that document was prepared, sir?

A What time of day?

MR. HENSON: Which document are you talking about?

MR. STIX: Plaintiff's 5, for identification.

(Continuing) It was in the evening of the 29th.

Q What did you do with the document which is Plaintiff's 5, for identification, after it was prepared?

MR. HENSON: What did who do? [30]

MR. STIX: What did the witness do.

A With Exhibit 4 and 5? I presented them before the Judge, and he signed them.

Q Was the Judge sitting at that time?

A No, he was Acting Justice Bendor.

Q Was he on the bench at the time he signed it?

A No, he signed it at his home.

Q Who took it to his home?

A I did.

Q Did you go to his home by yourself or with somebody else?

A By myself.

Q At this point, had you spoken with the local attorney prosecutor or the District Attorney about this matter?

A No, I hadn't spoken to anyone.

Q Had you, at this point, prepared your policy report?

A No, I had not.

Q Do you recall, approximately, what time Judge Bendor actually signed the arrest warrant?

A I don't know the exact time.

Q Do you know the approximate time? [31]

A It was in the evening of the 29th.

Q What, if anything, did you do in regard to the misdemeanor or complaint and the warrant of arrest, after the Judge signed it?

A What did I do?

Q Yes.

A The next day, I went up to the State Police Barracks in Sommers, the day the warrant was signed. After the warrant was signed, I called the State Police and asked them if the address that I had was in their jurisdiction. And they said, yes, so I went up to the State Police Barracks.

Q Did you go up to the State Police Barracks by yourself or with someone else?

A By myself.

Q What type of automobile were you driving?

A 1977 Nova, blue.

Q Is that a police vehicle?

A It is an unmarked vehicle, unmarked police vehicle.

Q What police barracks did you go to?

A The Sommers' Barracks

Q What did you do when you arrived there? [32]

A I showed him the warrant and the Information and they accompanied me to the Conway residence.

Q You went in your unmarked police car?

A Yes, I did.

Q Can you tell me where this barracks was, the address?

A It is in Sommers, on Route 100.

Q Then you proceeded to the Conway residence?

A Yes, I did.

Q Do you recall the time you arrived there?

A About – I don't know, I think, a little after 7 p.m.

Q What's her address? Do you know the address of the home?

MR. HENSON: Where he went?

MR. STIX: Yes.

A Some place in North Salem. I don't know the exact address.

Q Did there come a time when you arrived at approximately 7:00?

MR. HENSON: He said he arrived after 7.

Q Did there come a time after 7:00, on or about June 30, [33] that you arrived at the Conway residence in North Salem?

A Yes, I did.

Q What, if anything, did you do when you arrived?

A When we arrived, Mr. Conway was out in the yard, and we advised him we had a warrant for his wife. Shortly after, she walked out, and we told her we had a warrant for her arrest, and she should come with us to the Mount Kisco Police Station.

Q Was it light or dark outside?

A Light.

Q Can you describe their house for me?

A No, I cannot describe it.

Q Were there any houses on either side of the Conway house?

A I did not see a house other than their house.

Q Were there any other houses on the street, that you can recall seeing?

MR. HENSON: This may be relevant, but I don't see it.

MR. STIX: I think the rules are, anything that may [34] be relevant.

MR. HENSON: Answer, if you can.

A To the best of my recollection, I did not see any houses near the Conway house.

Q Did you see anyone else outside?

A No.

Q Can you tell me how you knew it was Mr. Conway out in the yard?

A He said he was.

Q When Mrs. Conway came out of the house, what was she wearing, if you remember?

A No, I don't.

Q What, if anything, did you do when she came out of the house?

A Advised her we had a warrant for her arrest and she should accompany us to the police headquarters. And Mr. Conway said, he would drive her, and we told him he could follow us down if he liked, but she was our property and that was not our policy.

Q Did Lynn Conway say anything?

A She said she didn't know the reason why there was a warrant for her arrest.

Q What, if anything, did you say?

A I told her we had a warrant for her arrest, and she should accompany us to the Mt. Kisco Police Headquarters. [35]

Q Did this conversation take place when you were outside your car?

A Yes.

Q Was Investigator Murphy outside the car?

A No.

Q Can you tell me how you knew it was Mr. Conway out in the yard?

A He said he was.

Q When Mrs. Conway came out of the house, what was she wearing, if you remember?

A No, I don't.

Q What, if anything, did you do when she came out of the house?

A Advised her we had a warrant for her arrest and she should accompany us to the police headquarters. And Mr. Conway said, he would drive her, and we told him he could follow us down if he liked, but she was our property and that was not our policy.

Q Did Lynn Conway say anything?

A She said she didn't know the reason why there was a warrant for her arrest.

Q What, if anything, did you way?

A I told her we had a warrant for her arrest, and she should accompany us to the Mt. Kisco Police Headquarters.

Q Did this conversation take place when you were outside your car?

A Yes.

Q Was Investigator Murphy outside the car?

A Yes, he was.

Q You don't wear a uniform?

A No.

Q Was Investigator Murphy wearing a uniform?

A No.

Q Did you identify yourself as a detective?

A Yes, we did.

Q How did you do that?

A By approaching an individual with our shields and identifying ourselves.

Q You and Investigator Murphy showed your badges?

A Yes, we did.

Q What, if anything, happened then as far as Lynn Conway was concerned?

A She got into the car and we drove to Mount Kisco.

Q Were any handcuffs put on her? [36]

A No, there was not.

Q Was she padded down for weapons first?

A No.

Q Was there any conversation in the car?

A Not to my knowledge. Between Murphy and I, yes, but not with her.

Q How long did it take to go from Lynn Conway's house to the Mount Kisco Police Headquarters?

A Approximately, forty, forty-five minutes.

Q During the automobile ride, did Lynn Conway show you a letter from the Dry Dock Savings Bank?

A No, she didn't.

Q Was there any discussion – did you hear any discussion between Investigator Murphy and Lynn Conway, during the ride?

A Not to my recollection, no.

Q Do you remember what Lynn Conway was wearing at the time?

A No, I do not.

Q Approximately, what time did you arrive at the police headquarters?

A About 8:45, approximately.

Q When you arrived, where did you park your car? [37]

A Parked my car on the side of the police headquarters.

Q Was Lynn Conway removed from the car?

MR. HENSON: Objection to the form of the question.

Q Did there come a time when Lynn Conway left the car?

A Yes.

Q How did she leave it?

A On her own will.

Q Was she escorted by the police detectives?

A Yes, she was.

Q Was she handcuffed at this point?

A No, she was never handcuffed.

Q What did investigator Murphy do at this point?

A He rode back with me to police headquarters.

Q Did he stay in the car or get out of the car?

A Got out of the car.

Q Did the three of you, Conway, Murphy, and yourself, enter the police headquarters together?

A Yes.

Q What, if anything, occured when you entered the police department? [38]

A She was booked and turned over to the matron.

Q When you say booked, what did that involve?

A The Desk Sergeant books every defendant that comes in with name, address, and date of birth, and occupation, social security number.

Q Is this written down?

A Yes, it is.

Q Where is it written?

A We have an arrest docket, and the rest of the information at headquarters.

Q Do you have a copy of that docket with you today?

A I have a copy of the arrest report.

Q When was the arrest report made up?

A Shortly after the Sergeant, the Desk Sergeant, gets their information from the individual.

Q Who prepared that, yourself or the Desk Sergeant?

A I signed it, but I'm not sure who typed it up.

Q Can I see that, please?

MR. HENSON: Let's have it marked for identification first, please.

(Whereupon a report of arrest #12,401 was marked Plaintiff's Exhibit No. 6, for identification.) [39]

Q I show you what has been marked Plaintiff's 6, for identification, and ask you if you can identify it for the record.

A It is a report of an arrest.

Q Whose arrest?

A For Mrs. Conway, Lynn Conway.

Q Is there a signature on this report?

A Yes, my signature.

Q This is a copy, is it not?

A Yes, it is.

Q Do you know where the original is?

A I have no idea.

Q Are these reports maintained by the Mount Kisco Police Department?

A We don't have them, they are in the Clerk's hands. She takes them upstairs.

Q Detective, other than Plaintiff's 6, for identification, are there any other — were there any other police reports you made out concerning this matter at this time, that's subsequent to the arrest?

A After the arrest, the only other report is the Chief's report. [40]

Q The Chief prepares that?

A No, I prepare it.

Q You submit it to the Chief?

A I prepare it and submit it to the secretary, and she types it up.

Q Does it go to the Chief?

A Yes.

Q Who signs that document?

A No one signs it.

Q Do you have a copy of that with you?

A No.

Q Can you supply it to us?

MR. HENSON: We will take it under advisement.

Q Do you know the date on that Chief's report?

A I have no idea, no.

Q Is that what the document is officially titled?

A In the correspondence report — after all our investigations, we are required to make a report to the Chief.

Q When was this correspondence report prepared, in this case?

A I usually write it up after the arrest. There is no specific time. [41]

Q So is it fair to say, this correspondence report was prepared within a week after June 30, 1977?

A Sometimes a week, sometimes two weeks, sometimes longer. Depends how busy you were.

Q Do you recall if you were busy?

A Yes, very busy.

Q You were busy on June 30, 1977

A Yes, I was.

Q When you prepared the corresondence report for the Chief, did you use any notes or memorandums you had made yourself, or from memory?

A Sometimes I do, sometimes it is from memory.

Q In this case, were there notes or from memory?

A From memory.

Q How many other cases were you working on on June 30, 1977?

A It is a little hard to tell.

MR. HENSON: Now you are getting into cross-examination.

MR. STIX: I think we have the usual stipulations, so you can allow him to answer and maintain your objection. [42]

MR. HENSON: That doesn't fall within the stipulations.

Q Do you know whether you prepared a correspondence report in this matter?

MR. HENSON: I think he has already answered that.

Q Do you know the date you prepared it?

MR. HENSON: He has answered that, too.

Q Do you remember receiving a Notice to Take Deposition in this matter?

A (No response)

MR. STIX: Please mark this Plaintiff's 7, for identification.

(Whereupon a Notice to Take Deposition dated April 17, 1980, was marked Plaintiff's Exhibit No. 7, for identification.)

MR. HENSON: Do you understand the question?

Q I show you what has been marked Plaintiff's 7, for identification, and ask you if you've ever seen that before.

MR. HENSON: You mailed it to me.

Q Did you ever see that report before? [43]

MR. HENSON: I don't know –

MR. STIX: In my Notice to Take Deposition, Plaintiff's Exhibit 7, for identification, I call for a police report.

MR. HENSON: It speaks for itself.

MR. STIX: I cannot conclude the examination, unless I have it. But before I conclude the examination, I would like to see those reports that are not here.

MR. HENSON: You can stand on your record. What those reports are – you will have to ask him each individual one.

Q Besides the Chief's report, the correspondence report, were any other reports prepared in this case?

A No.

Q Were any investigation reports made?

A No, not by me.

MR. HENSON: Well, that is an investigation report.

Q A police report, investigation report.

A No other investigation was done by me.

Q Were you present when the Desk Sergeant booked Mrs. Conway? [44]

A Yes, I was.

Q Where did this take place?

A In the Mount Kisco Police Department.

Q In the front desk?

A Behind the front desk.

Q Who was the Desk Sergeant?

A Sergeant Dunnigan.

Q Do you have the booking report?

A They have another report there that they record the information on, with reference to the same things that are on here, but in a different form.

Q What's that called?

A Arrest Information.

Q At this point, was Mr. Conway present in the police station?

A Yes he was.

Q When did he arrive?

A Shortly after we did.

Q Was Investigator Murphy there?

A Yes, he was.

Q Did there come a time when Investigator Murphy left?

A Yes, he did. [45]

Q Approximately, when was that?

A I don't know because I had to go upstairs to court and he had to call someone to pick him up. I was going to drive him back, but I didn't get a chance.

Q After Lynn Conway was booked, was she released?

A No.

Q What happened after she was booked?

A Court was in session at that time, and I advised the Judge we had a defendant downstairs. And he asked that she remain there until he finished court.

Q When she remained downstairs, where specifically did she remain?

A With the police matron in the hallway.

Q Do you know if the police matron ever searched the defendant for weapons?

A I do not know.

Q They were in the hallway?

A In the hallway of the cell block area, where all the defendants are booked.

Q Did there come a time when the defendant was arraigned before the Judge?

A Yes, he did come downstairs.

Q Do you know, approximately, what time that was? [46]

A No, I do not.

Q Were you present?

A No, not for the arraignment.

Q You went off duty what time, 12:00?

A I was scheduled to go off at 12, but I don't think I did that particular night.

Q Do you know what time you went off duty that night?

A I have no idea.

Q Was the defendant still in the cell block area when you left?

A She was still there. I left after she did.

Q Do you know what time the Judge came down and arraigned her?

A There was court late that night, so it was after 12.

Q Do you know if it was after 1?

A According to Ms. Healey's report, it was after 1.

Q What time did Ms. Healey's report say it was?

A 1:35 a.m.

Q That report of Ms. Healey – she's the Court Clerk, is she not? [47]

A No. She's our matron.

Q Was she the police matron on duty that night?

A Yes, she was.

Q She's the one that took charge of Lynn Conway?

A Right.

Q Can I see her report, please?

MR. HENSON: Let's have it marked, please.

(Whereupon Ms. Healey's report was marked Plaintiff's Exhibit No. 8, for identification.)

Q By the way, Detective, what is Investigator Murphy's first name?

A James Murphy.

Q I show you Plaintiff's Exhibit 8, for identifcation, and it appears from this report that a prisoner was removed from the cell block area to the detectives' office between 12 and 12:30. Do you have any personal knowledge of that?

A No, I do not.

Q Where were you between 12 and 12:30 on the morning of July 1st?

A I really don't know. I was either upstairs on a call, or something. [48]

MR. HENSON: She was still in the custody of the police matron at that point?

WITNESS: Yes, she was.

Q Subsequent to the prisoner's release on her own recognizance –

MR. MATLIN: Objection. There has been no basis laid.

Q Do you know, whether or not the prisoner was released that night?

MR. HENSON: You are talking about his personal knowledge?

MR. STIX: Yes.

A I was told she was released on her own recognizance.

Q Your information is based on what you heard and on Plaintiff's 8?

A Yes.

Q Subsequent to her release that night, have you had any contact with this case whatsoever?

MR. HENSON: Objection to the question.

Q Have you done any work on this case?

MR. HENSON: Objection to the form. Do you have something specific in mind? [49]

Q What, if anything, did you do with regard to this case, after June 30, 1977, if anything?

A None.

Q After the arrest, what did you do with the arrest warrant and the criminal complaint?

A This was taken upstairs to the Judge.

Q How many copies of the arrest warrant and criminal complaint were prepared, prior to the arrest?

A I'm not sure. Sometimes I make duplicate copies. If the secretary is present, usually I make one copy and she runs the rest off.

Q Do you know how many arrest warrents were made, on June 30, 1977?

A How many copies did I make?

Q Yes.

A It could have been one, no more than two I made myself. I'm not sure.

Q How many misdemeanor complaints did you make in this case, prior to the arrest?

MR. HENSON: You mean the accusatory instrument?

MR. STIX: Yes. [50]

A It would be two if I used the photo – carbon copy, it could have been two.

Q Do you know how many accusatory instruments you made?

MR. HENSON: There is only one presumably, but you are asking how many copies were made before signature?

MR. STIX: Yes, before the arrest

MR. HENSON: No, before signature.

Q Yes, before signature, how many were made.

A I said, if I use a carbon copy, there were two copies made.

Q When you went upstairs to the Court after the arrest, you gave the Court one copy?

A They get all the copies.

MR. HENSON: They get the original or copies?

WITNESS: They get the original.

Q They got the original arrest warrant and the original accusatory instrument.

A Yes.

Q Did you maintain a copy of that in your files?

A The secretary takes care of that. [51]

Q Did you deliver any of these documents to the District Attorney or the local town prosecutor?

A Maybe the secretary gave them to them.

Q Did you ever present a copy of them to Alfred Martabano?

A No, I did not. We are not allowed to do that.

Q Why are you not allowed to do so?

A It is up to the prosecutor.

Q You say calling people such as the defendant on check cases was standard procedure in the Department at that time?

MR. HENSON: I think he has already answered.

Q Is that still the procedure?

MR. HENSON: Objection. It is not relevant what it is now.

Q Did there come a time when that procedure changed?

MR. STIX: What is relevant and not relevant is up to me at this point. It may be relevant to my case.

MR. HENSON: I don't think his previous answer [52]
indicated that this was done in every case, but in certain types of cases it was standard procedure to do it. You've already asked and answered that question if you are going to go back over the whole thing. I don't think the way you framed your question –

MR. STIX: I'll reframe it.

Q Was the procedure in June of 1977 in every bad check case that was given to you for investigation, the procedure to call the issuer of that check if the complainant requested you to do so?

MR. HENSON: I don't think that that is in evidence.

MR. STIX: I'm asking the question. Of course, it is not in evidence.

Q Do you understand my question?

MR. HENSON: There is nothing in this record. And he has already answered this, that he was not requested. He asked the complaining witness if he wanted him to make a call, and the complaining witness said, it doesn't matter to me.

Q Do you ask that question – you heard your attorney [53]
– in June of 1977, did you ask complainants on bad check cases whether or not they wanted you to call the issuer of that check?

MR. HENSON: In every case or in certain types of cases?

MR. STIX: I am using your words.

MR. HENSON: This case falls into a certain category.

Q Why don't you tell me what category?

MR. HENSON: Objection.

MR. STIX: I am using your words.

A I don't know what category.

MR. STIX: Is there an objection to the question?

MR. HENSON: Yes.

MR. STIX: What is your objection?

MR. HENSON: I object to the form of the question.

Q I am going to ask you to repeat your answer to the prior questions. I don't understand it. When someone came to you in June of 1977, with a bad check, did you follow a set procedure, yes or no?

MR. HENSON: I will object to the form of the question. I don't think he can answer that. [54]

Mr. STIX: Of course he can.

Q Did you follow a set procedure in this type of case?

MR. HENSON: I don't know what you mean by set procedure.

MR. STIX: Why don't you let the witness tell me if he doesn't understand the question?

MR. HENSON: I don't understand it. I'm going to object to the form of it.

Q Detective McKenzie, in June of 1977, what if any action did you take to investigate bad check cases?

A It depends.

Q On what?

A On the claimant, and whether or not we had received bad checks from this individual.

Q Did you maintain a file at the police headquarters on individuals who had issued bad checks in the past?

A I could show you a whole stack of them.

Q The actual checks were maintained, or the names of the individuals?

A The checks are there. [55]

Q In the Police Department?

A Yes, they are.

Q Was that standard operating procedure in June of 1977, for the police to maintain these bad checks?

MR. HENSON: I think that's his answer. He has already answered that.

MR. STIX: Let him answer again. I never asked this question.

MR. HENSON: Can you answer it? Do you understand the question?

THE WITNESS: Yes.

Q Did you maintain the originals or copies?

A The originals.

Q At any point in June of 1977, before preparing the accusatory instrument—

MR. HENSON: In this case.

Q —in this case, did you look to see if Lynn Conway had ever filed a bad check that was known to the police?

A Did I look?

Q Yes, in your pile of checks.

A No.

Q Are these checks maintained in alphabetical order? [56]

A No.

Q In what kind of order?

A They are in a folder.

Q They were loose in a folder?

A Yes.

Q Where was the folder kept?

A In a file cabinet.

Q So you did not know, in June of 1977, whether or not Lynn Conway had issued a bad check before?

MR. HENSON: He didn't say that.

Q Do you know?

A I do not know.

Q You said it also depended on the claimant. Can you tell me what you mean by that?

A Can I explain—

MR. HENSON: He cannot answer it, apparently, this way.

Q You can explain it any way you want to explain it.

A Prior to the installation of the ADA's Office in Mount Kisco, we were innundated with checks and a lot of them were [57] constant repeaters.

MR. MATLIN: Claimants or issuers?

THE WITNESS: Both claimants and checks were constant repeaters.

A (Continuing) We had merchants innundating us with checks, and that's why we had a pile of checks there. To the best of my recollection, I did not see Mrs. Conway or recollect her check as being one of those checks. Due to the fact we had constant repeaters, I remembered a lot of those constant repeaters and the merchants.

It was our procedure, at that time, to take care of all the checks, which was one of my jobs, take care of all the checks brought into the office. That has ceased since then.

Q Do you still maintain that check file?

A No.

Q What was the ultimate disposition of that file with checks in it?

A The ADA suggested that the check load was getting too heavy. They were going to start handling specific checks.

MR. HENSON: Who is the ADA?

THE WITNESS: It changes so often—

MR. HENSON: Was this the Assistant District [58] Attorney?

THE WITNESS: Yes.

Q This was subsequent to June of 1977?

A Yes.

Q Was Bano Buick one of the merchants that had come in before with bad checks?

A I've handled checks for Bano Buick before, yes.

Q Was a distinction drawn between merchants who came to you with bad checks and individuals who came to you with bad checks?

A No.

Q Can you tell me what you mean by, it depends on the claimant?

A Some of the merchants only requested that they get their money. Therefore it was a waste of time to do the paperwork.

Q When the merchants just wanted their money, what, if anything, did you do?

A Occasionally, I would suggest they give them a call. And if they got no result, if they turn the check over to us, rather than do all the paperwork, we would make a phone call to the person who issued the bad check. [59]

Q What would happen after the phone call, if anything?

MR. HENSON: Objection. You mean, what was the procedure?

Q What was the procedure after you made the phone call, if the money wasn't paid?

MR. HENSON: I'll object to the form of the question. I think you are going—we tried to answer. You've given him too many conjectures.

Q Was there a standard procedure in June of 1977, as to what an investigating detective would do after making a phone call to the issuer of a bad check if the money wasn't paid?

MR. HENSON: I think he has already answered it.

MR. STIX: I don't know what the answer is.

MR. HENSON: Do you understand.

THE WITNESS: I don't fully understand what he is trying to get.

Q What would you do next? I'm talking about what the police procedure was, if a creditor came in and said, I have a bad check, make a phone call. You made a phone call and the money wasn't paid, and they didn't want to prosecute, was there any procedure set up for the next action? [60]

MR. HENSON: That isn't the way I recall him describing the procedure at all.

Q Can you tell me what you would do, if anything, after you made the initial phone call to the issuer of a bad check?

A Depending on the merchant or the complainant. If they didn't want to prosecute, I wouldn't bother.

Q Did you ever call the merchant as a follow up to see whether or not the money was paid?

A No, usually after a few days, they would contact me or whoever is taking care of the check. There were four of us back there.

Q Did you tell Mrs. Conway who she should pay the money to?

A I advised her to contact Bano Buick.

Q No money is actually paid through the police department?

A No, we don't collect any money.

Q You said Bano Buick had come to you before with some bad checks, had they not? [61]

A Yes, I've done checks for Bano Buick.

Q Had you done checks for Bano Buick, prior to June 30, 1977?

A My Department has, yes.

A Had you personally?

A I was generalizing. Whenever any complaints come in the back, either I work with them or my partners.

Q Who were your partners in June of 1977?

MR. HENSON: Why don't we find out if they worked on this case?

MR. STIX: I just want to know who his partners were.

A Detective Sergeant Jerome Herlihy.

Q And the other partners?

A Detective Hyatt, Ralph Hyatt, and Detective Sergeant Robert Cercena.

Q Do you know, whether or not Herlihy, Hyatt, or Cercena handled any bad checks for Bano Buick, prior to June 30, 1977?

A I have no idea.

A Did you personally handle any checks for Bano Buick prior to June 30, 1977? [62]

A I could have, I'm not sure.

Q You have no memory now? If you have no memory, just say you don't remember.

MR. HENSON: I think he has already said it.

Q That's your answer, you don't remember?

A That's what I said.

Q Can you tell me who were some of the other merchants who came in with bad checks around this time of year?

MR. HENSON: Objection. I'm not going to allow him to answer. It is not relevant.

MR. STIX: I have no further questions.

EXAMINATION BY

MR. MATLIN:

Q If the Department had handled any other bad check cases for Bano Buick, would they be on record?

A If they were prosecuted, if they were up for prosecution.

Q If they were not prosecuted, what would have happened with the file?

A We would have no record of it.

Q No record of it at all? [62a]

A No.

Q You have no personal knowledge of any checks, bad check case, other than the matter at issue here?

A Not to my recollection.

MR. MATLIN: That's it.

• • •

Subscribed and sworn to
before me this 20th day of May, 1981.

STATE OF NEW YORK)
) ss:
COUNTY OF ROCKLAND) [63]

I, Sharon Kronenberg, a Shorthand Reporter and Notary Public within and for the State of New York, do hereby certify:

That LARRY McKENZIE, the witness whose examination is hereinbefore set forth, was duly sworn by me and that the transcript of said examination is a true record of the testimony given by the witness.

I further certify that I am not related to any of the parties to this action by blood or marriage and the I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this day of April, 1981.

Sharon Kronenberg
Shorthand Reporter

EXHIBITS [64]

Plaintiff's	Description	For Ident.
1	Dry Dock Savings Bank Check No. 154, Acct. No. 2260 7033 022840018 4 0154	12
2	Bank Advice dated 5/18/77	13
3	Bank Advice dated 5/26/77	13
4	Criminal Information dated 6/29/77	26
5	Warrant of Arrest, dated 6/30/77	28
6	Report of Arrest #12,401	38
7	Notice to Take Deposition dated April 17, 1980	42
8	Ms. Healey's Report	47

EXHIBIT C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER [1]

(SAME CAPTION)

May 29, 1981
10:00 o'clock a.m.

EXAMINATION BEFORE TRIAL of LYNN H. CONWAY and JEFFREY M. CONWAY, the plaintiffs, pursuant to notice, held at the offices of J. Boyd Henson, Esq., 149 Grand Street, White Plains, New York, on May 29, 1981 at 10:00 o'clock a.m., before a Notary Public of the State of New York.

APPEARANCES: [2]

WAYNE P. STIX, ESQ.
Attorney for Plaintiffs
175 Main Street
White Plains, New York 10601

J. BOYD HENSON, ESQ.
Attorney for Defendants, Village of
Mt. Kisco, Police Department of Mt. Kisco,
and Detective McKenzie
149 Grand Street
White Plains, New York 10601

GERALD W. MATLIN, ESQ.
Attorney for Defendants, Bano Buick
and Martabano,
153 Main Street
Mount Kisco, New York 10549

• • •

IT IS HEREBY STIPULATED AND AGREED by and between counsel for the respective parties hereto that all rights provided by the C.P.L.R., including the right to object to any question, except as to the form, or to move to strike any testimony at this examination, are reserved; and, in addition, the failure to object to any question or to move to strike any testimony at this examination shall not be a bar or waiver to make such motion at, and it is reserved for, the trial of this action.

IT IS FURTHER STIPULATED AND AGREED that this examination may be sworn to, by the witness being examined, before a Notary Public other than the Notary Public before whom the examination was begun; but the failure to do so, or to return the original of this examination to counsel, shall not be deemed a wiaver of the rights provided by Rules 3116 and 3117 of the C.P.L.R. and shall be controlled thereby. [3]

The filing and certification of the original of this examination is waived.

IT IS FURTHER STIPULATED AND AGREED between the attorneys for the respective parties hereto that a copy of this examination shall be furnished to the attorneys for the witness being examined, without charge.

• • •

LYNN CONWAY, one of the Defendants herein, having first been duly sworn by Philip E. Picker, a Notary Public of the State of New York, was examined and testified as follows:

EXAMINATION BY [4]

MR. HENSON:

Q What is your full name?

A Lynn Helen Conway.

Q Your address?

A Lakeview Drive, North Salem, New York, 10560.

Q Would you please give us your date of birth?

A 2/19/47.

Q You are the plaintiff in the action against Bano Buick and others, are you?

A Yes.

Q What is your martial status?

A Married.

Q To whom?

A Jeffrey Conway

Q What was the date of your marriage?

A June 10, 1972.

Q Do you have any children?

A None.

Q What is your occupation?

A Office manager.

Q Where? [5]

A Alvin Yapalater, M.D.

Q Alvin –

A Yapalater.

Q Would you spell that.

A Y-A-P-A-L-A-T-E-R.

Q Is he a psychiatrist?

A Yes.

Q Are you under his care and treatment?

A No.

Q Beg your pardon?

A No, I am not.

MR. STIX: She said he was the office manager.

MR. HENSON: I understand that.

Q You have never been under his care and treatment then?

A Well –

MR. STIX: I am going to object. I don't see what the relevancy is.

MR. HENSON: You are looking for lots of money here. You claim all kinds of –

MR. STIX: I still don't see the relevancy. [6]

MR. HENSON: Off the record. [Discussion off the record.]

MR. STIX: I will withdraw my objection. Answer the question.

A Yes, I was treated by him briefly after this arrest.

Q How long?

A Several months.

Q For several months?

A Yes.

Q Did he ever render a report to you?

A A written report?

Q Yes.

A No, not to me.

Q Did he render it to your attorney?

A No.

Q To whom did he render it?

A He didn't render a report.

Q Did he set up a file?

A I believe so.

Q These treatments, how often did you receive them? [7]

A A couple of times a week.

Q For how long?

A Several months.

Q Beg your pardon?

A Several months.

Q How long was each session?

A About an hour.

Q Did Dr. Yapalater himself give you these –

A Yes, he did.

Q What did these treatments consist of? What did he do, as far as you know?

A I guess you would call it a psychotherapy session. I would discuss my feelings about the arrest. It was difficult for me to work.

Q Previous to this, had you ever consulted a psychiatrist?

A No.

Q Did you receive a bill from Dr. Yapalater?

A No.

MR. HENSON: Do you have a report from Dr. Yapalater, Mr. Stix?

MR. STIX: No.

MR. HENSON: Have you requested one? [8]

MR. STIX: No.

MR. HENSON: In the event you are going to produce him, I want to examine her further, if you are going to produce him as an expert witness for any kind of a condition, okay?

MR. STIX: I will take it under advisement. I think you have a right to do so.

Q Prio to June 30, 1977, did you have any kind of business transctions with Bano Buick in Mount Kisco, New York?

A Yes.

Q Did you conduct those business transctions, or did your husband?

A Both.

Q What was the nature of the business transactions?

A Auto repair.

Q What was that?

A Auto repair.

Q What kind of a car was that?

A It was a – I believe it was a '72 or '73 Opel Manta. [9]

Q Opel?

A Opel Manta.

Q What was the nature of the repairs requested?

A Well, there –

MR. STIX: On which occasion? Was there one occasion or more than one occasion?

THE WITNESS: There were two occasions.

Q What was the first occasion?

A The first occasion was some time in January of 1977. I broke down – the car broke down while I was driving home on 684.

Q Yes?

A The next day it was towed – it couldn't be driven, and it was towed to Bano Buick.

A Was the car repaired for that?

A Yes.

Q Did you pay the bill?

A Yes.

Q Do you remember how much the bill was?

A Approximately $192. It was for an engine problem. [10]

Q When was the second occasion?

A In April of '77.

Q What was that?

A A similar situation. I was driving home on 684 and the car broke down.

Q Driving home from work on each occasion?

A Yes.

Q Was it towed in again by Bano Buick?

A Yes. Not by Bano Buick, by a towing concern.

Q It was towed by a towing concern to Bano Buick?

A Yes.

Q Did they do the repairs on it?

A Yes, Bano Buick repaired it.

Q Did that include the replacement of an engine?

A Yes.

Q Did you pay for that?

A I did pay for it, then I stopped payment on that payment.

Q You mean you issued a check? [11]

A I issued a check.

Q Do you have that check?

MR. MATLIN: I have that. It has been previously marked as Plaintiff's Exhibit 1.

Q I show you this exhibit marked Plaintiff's Exhibit 1 for identification, and ask you if this was the check that you issued?

A Yes.

Q Do you have your bank statements from Drydock Savings Bank here?

A I believe so. Yes, I have a May statement.

MR. STIX: What would you like to see?

MR. HENSON: Let me see the May statement.

MR. STIX: As of May 20.

MR. HENSON: Could we have this marked for identification as Defendant's Exhibit A, consisting of two pages. [at this time, said document consisting of two pages is marked for identification as Defendant's Exhibit A.]

MR. HENSON: Do you have an envelope on this? [12]

MR. STIX: Yes.

MR. HENSON: Perhaps we should just put the envelope with it, if that is all right with you.

MR. STIX: Fine. Wait a minute, is that the envelope it came in?

Q Is this the envelope it came in?

A I believe it is. Probably you could tell by the date stamped on the postage.

MR. HENSON: Would you mark that also.

MR. STIX: Let the witness look at it and determine if that is the envelope. She thinks that is the envelope.

MR. HENSON: Shall we mark this as part of this Defendant's Exhibit A? Make it two pages plus the envelope, if you would.

Q Can you tell us in any way when this was received, this statement?

A I can try.

MR. STIX: You are not to guess. Either you know or you don't know, don't guess. He asked you a question. If you don't know the answer, you don't know. [13]

THE WITNESS: No, I don't know.

Q Can you read the postmark on the envelope?

A Hardly.

Q It's May something, 1977?

A Yes, I guess.

Q Do you have your bank statement for the following month, the next statement that you received?

A I have it at home, I am sure.

Q You stopped payment on this check, as I understand it; is that correct?

A Yes.

Q What date did you stop payment on it?

A The day after it was written.

Q You wrote it May 10th, isn't that correct?

A If that is what it says on the check.

Q You are quite sure that it was not until the next day that you stopped payment?

A The check was written approximately five or five-thirty at night.

Q Yes? [14

A So it was the next morning. It was the next morning that payment was stopped.

Q You didn't go to the bank and stop payment on it right away?

A The bank wasn't open.

Q Why did you stop payment?

A Because the work was not done properly. It was a faulty engine put in my car.

Q Did you drive the car away from the –

A Yes, I did.

Q – away from the garage?

A Yes, I did.

Q Did you have any conversations with anybody there concerning taking the car without giving a check?

A Without giving a check?

Q Yes.

A No.

Q Who were you talking to?

A I believe it was the service manager.

Q Do you know who it was?

A I think it was a Richard Marushak, or something like that. [15]

Q Marushak?

A Marushak.

Q He presented the bill and you wrote the check; is that the way it was done?

A He presented the bill and we questioned what year engine was put in our car, and he told us that he did not know what year engine was put in the car, that there was no way for him to tell what year engine was put in the car, and the fellow who had obtained this engine for Bano Buick was on his way to North Carolina, back to school, and there was no way they could tell what engine was in the car.

Q Did you have conversations with anybody concerning the year of the engine to be put in the car?

A Yes.

Q Who did you talk to?

A The same person.

Q Did you tell him what year engine was to be put in the car?

A No. As a matter of fact, they weren't supposed to put any engine in the car.

Q As far as you knew?

A Yes. [16]

Q Do you know whether or not your husband had –

MR. STIX: Wait a minute, I object to the form of that question, as far as she knew.

Q Were you the only one who made the arrangements for this new engine?

A No.

Q Did somebody else make the arrangements also?

A Yes.

Q Your husband?

A Yes.

Q Were you present at the time those arrangements were made?

A I wasn't present, but I knew about it.

Q You didn't hear the conversation, did you?

A No.

Q What year engine was to be put in the car?

A No engine was to be put in the car.

Q It was not to be replaced?

A Only upon my husband's approval.

Q Did you make that arrangement with Mr. Marushak? [17]

A No, my husband made the arragements.

Q You don't know what the conversations were?

A My husband told me.

Q You are talking about what your husband told you, and I am not asking you that, I'm asking you what you knew about the conversations with the service manager, Mr. Marushak.

MR. STIX: She is telling you what she knows.

A I am trying to tell you what I know.

Q You are talking about conversations you had with your husband, aren't you?

A That's how I know what I know.

Q I'm asking you about conversations between you and the service manager.

A Okay. That was when the car was picked up that I spoke directly to him. The arrangements before –

Q Did you discuss at any time with him about putting in a new engine?

A No. [18]

Q Or a different engine?

A No.

Q Did you authorize him to make repairs?

A No.

Q What did you ask him to do when the car was brought in?

A I didn't ask him to do anything, my husband spoke to him.

Q You made no arrangements yourself then for the repair of this car?

A Not directly.

Q Any arrangements would have been made then by your husband, is that what you are saying?

A Yes.

Q Did you have any further conversations with the service manager, Richard Marushak, or whatever his name is, after that?

A After that evening?

Q Yes.

A No.

Q What was the date that this second occurrence took place?

A The car was — the bill — the car was brought in I belive around April 15. [19]

Q I have a note here — around April 15, you say?

A I believe so.

Q You didn't pick it up then until May 10?

A Yes.

Q Did you use another car to get back and forth to work then?

A No.

Q How did you travel?

A I got rides and took the train.

Q Is this Defendant's Exhibit A, the statement from the bank, is that accurate, as far as you know?

A As far as I know.

Q On May 12, the balance indicated seems to be $391.77. On May 13, it shows $361.77. Is that accurate, as far as you know, for those dates?

MR. STIX: Give us those dates again, the 12th and the 13th?

MR. HENSON: I think it's the 12th and 13th, yes.

MR. STIX: What were the numbers, $391.77 on the 12th and $361.77 on the 13th? [20]

MR. HENSON: I believe so.

MR. STIX: That is what the statement says, and we believe that is accurate.

Q Do you recall what day of the week this was, May 10?

A No.

Q After you issued the stop order to the bank, what happened, as far as you know?

A As far as what?

Q Did the bank stop payment?

A They were supposed to.

Q There came a time, did there not, when you received a call or a communication from a police officer of the Village of Mount Kisco?

A Yes.

Q Do you know who the officer was?

A Yes, Detective McKenzie.

Q Do you remember when it was?

A June 28, '77 at eleven p.m.

Q What time?

A Eleven p.m. [21]

Q Prior to that, what happened with the car? What did you do about the car?

A As far as what?

Q Did the car operate all right?

A No.

Q When you had the conversations about which engine was put in, did you have those conversations with—

A Where?

Q —with the service manager?

A Where?

Q Wherever you were talking to him, I assume at the service station.

A You mean when I picked up the car?

Q Yes.

A Yes.

Q What did you say to him and what did he say to you?

A He presented a bill. He said an engine had been put in the car. I asked him what year engine was put in the car.

Q He said he didn't know?

A He did not know. [22]

Q Then what happened?

A We discussed it a little further, you know. I would like to know if I am paying $431, what year engine is going into my car, and he told me there was no way he could tell, the fellow who had obtained the engine for Bano Buick left, and he was going back to school, and if we wanted to—if we decided not to take the car and try to have, you know, try to make arrangements for another engine, it would be at our expense, we woould have to pay to have that engine taken out and pay for another one to go in, and he had no idea when he might even get to do it.

Q Did you inspect the engine at that time?

A My husband did.

Q At the time you picked it up?

A Yes, he looked at it.

Q Did your husband have conversations with him at that time, also?

Q Yes.

Q Did you have an understanding yourself as to what year engine was supposed to be put in?

A No. [23]

MR. STIX: Asked and answered. No engine was supposed to be put in. That's the testimony.

MR. HENSON: That is her testimony?

MR. STIX: That's right.

THE WITNESS: Yes.

Q You did not make the arrangements?

A No.

Q Did the car operate properly?

A After we picked it up?

Q Yes.

A No.

Q What was wrong with it?

A It was either the generator light or the alternator light; I don't know which one, stayed on, and the car discharged rather than charged when you are driving it, which means the battery went dead constantly. That started from the minute we drove it away.

Q Did the car stall, you couldn't get it started?

A Yes, I would stall out. It would ride very rough. It would [24] hardly drive at all.

Q Did you make a complaint to them about that afterwards?

A Only when I was contacted by them.

Q When did they contact you?

A After the check—whatever happened with the check, I believe my bank made a mistake and marked it insufficient funds in error instead of the stop payment. That is when I was called.

Q That would have been some time after May 18?

A I'm not sure.

Q It was several days later, in any event?

A Yes.

Q Several days passed and did you drive the car?

A No.

Q You left it in the garage?

A I left it in my driveway.

Q Did you drive it any place other than to your house, after you picked it up?

Q Not immediately after, because there was a problem with it.

Q Well, between the time that you picked the car up and [25] the time you had a call from Bano Buick seeking the money—is that what they were calling about?

A Yes.

Q —did you operate the car in any other way?

A No, just drove it home that day.

Q That was it?

A Yes.

Q When they called about the money, did you complain about the car?

A Yes.

Q What did you tell them?

A I was called by Mr. Martabano who was calling me because the check had bounced. I informed him that the check didn't bounce, that I put a stop payment on that check because the work was not done properly, and was not even authorized to be done in the first place. I made it explicit that it was not a matter of insufficient funds.

Q Had you received notice at that time from the bank in any way?

A Notice of what? [26]

Q Of the check not being honored, or that it was stopped?

A I received—I believe I received the stop notice whenever they stopped it.

Q Do you have that?

A I don't have it with me. I don't even think I have it.

Q You don't have it, or you don't have it with you now?

A I don't have it with me, no, and I am not sure I have it.

Q That is a fairly important document in this litigation, isn't it?

A Not really.

Q You never have seen that document since?

MR. STIX: Since when?

A Since when? I mean it was sent to me by the bank, authorizing that I had stopped payment.

Q All right, you don't have that document?

A I'm not sure. I don't think—I'm not sure.

Q Do you keep a file?

A It depends on what. [27]

Q Do you keep a file on your bank account?

A Yes, I keep my bank statements.

Q You don't know whether it is in among your bank statements?

A Well, it is not in that one, and the bank doesn't have it listed on the bank statement, which I would assume they would have done that, but they don't have it mentioned.

Q You are talking about Defendant's Exhibit A, right?

A Yes. I assume that that would appear on your statement.

MR. HENSON: Would you ckeck and see if you have such a document, Mr. Stix?

MR. STIX: Yes, we will check. If we do, I will send it to you and Mr. Matlin.

MR. HENSON: If we leave a space, you can indicate in there whether or not you have it, and if you do, please just indicate a copy attached.

MR. STIX: Sure.

A _____

Q When did you first drive the car again after you received a call from the bank, when you received a call from Detective McKenzie? [28]

A I don't understand the question.

Q You did not drive the car between the time that you took it home and the time you received the call from Bano Buick about the money; is that correct?

A Yes, I just drove the car once. That was from Bano Buick to my house.

Q When did you drive it again after that, if ever?

A I didn't.

Q Was the car taken back to Bano Buick for any reason?

A No.

Q Were you present at any time there were any other conversations between Bano Buick and your husband?

A No.

Q When you had the call from Detective McKenzie on the date you indicated, on June 28, 1977 at about eleven p.m.; is that correct?

A Yes. [29]

Q Were you in bed?

A Yes.

Q What did he say to you and what did you say to him?

A He told me that he had some papers that were brought in or completed by Mr. Martabano from Bano Buick.

MR. MATLIN: Which Mr. Martabano?

MR. STIX: She is just repeating—

THE WITNESS: He didn't say, he just said Mr. Martabano from Bano Buick.

Q He didn't detail which Mr. Martabano?

A No.

Q Okay.

A He said that I owed them money for engine repairs, and that this was—these papers were instituting an arrest, and if I would go down and pay the bill, he wouldn't complete the papers and there wouldn't be any arrest.

MR. STIX: What did you say to him?

THE WITNESS: I told him that there was no matter of me paying the bill, because there was a stop payment on this, there was not insufficient funds. [30]

Q What did he say to you?

A He just told me if I went down and paid the bill, I wouldn't be arrested. If not, I would.

Q Did he suggest to you that you communicate with Bano Buick and try to work it out?

A No, he just said, "Go down and pay your bill and you won't get arrested."

Q Did he yell at you?

A He wasn't very nice. He didn't yell.

Q Were you nice to him?

A Yes, I explained it to him very nicely.

Q He was not very gentlemanly, is that what you are saying?

A Not that he was not gentlemanly, but at eleven p.m. at night, when I am gotten out of bed and told I am going to be arrested, it was rather shocking.

Q That was the first communication that you had with him; is that correct?

A Yes.

Q Then after that, what did you do?

A As far as what? [31]

Q As far as this conversation was concerned. Did you communicate with anybody?

A No.

Q Did you have only one conversation with him that day?

A That day, yes.

Q Did you communicate with your attorney after that?

A I did not—I communicated with an attorney that I knew. It was not Mr. Stix.

Q Who was that?

A Charles Eisner.

Q Was he your attorney on previous occasions?

A No.

Q Did he sue you or represent somebody else suing you?

A No, my office uses him for collection.

Q When did you communicate with Mr. Eisner?

A The next day, the next morning.

Q Then did you communicate with Officer McKenzie after that?

A Yes, I called him up.

Q What day was that? [32]

A The same day—the next day.

Q What did you say to him?

A I told him that he had no right to call me at home at eleven at night, and I gave him some legal—I don't recall, but Mr. Eisner had told me some legal terms to tell him, and I told him, and that was it.

Q You don't remember what those legal terms were?

A No, I don't.

Q Did Mr. Eisner write you a letter about it?

A No.

Q Did he send you a bill?

A No.

Q Have you ever heard those legal terms since?

A Abusive power, maybe.

Q Beg your pardon?

A Abusive power, possibly.

Q Is that what he said?

A I think that's what Mr. Eisner said to tell him, this is abusive power, he has no right to call me. [33]

Q Did you tell him he was abusing his power?

A Yes, I felt he was abusing his power.

Q Did you give him the name of your attorney?

A Who, Detective McKenzie?

Q Yes.

A I don't believe so.

Q What was the purpose of your call to Detective McKenzie?

A To tell him not to bother me and harass me.

Q Between the time of his call to you and the time of your call to him, did he call you or did he communicate with you in any way?

A No.

Q Had anybody else from the Village communicated with you in any way?

A No.

Q So you had one call from Detective McKenzie and that was it?

A Then he called me again that night. The night of the same day that I called him in the morning, he called again that night. [34]

Q He called you after you called him?

A Yes, that evening agin.

Q When you first spoke to him when he called you, did he request you to call him back?

A No.

Q I don't quite understand the purpose of your call. When you say you called him back to tell him not to harass you, the only thing he had done so far was call you, isn't that correct, just once, and he didn't say, "Call me back," or anything?

A I think eleven p.m. at night is harassment.

Q You called him up and said, "Don't call me again at eleven o'clock."

A I said, "Don't call me again at all about this matter."

Q Did he say he was going to call you again?

A No, he didn't.

Q He simply said that if the money was not paid, that you might have a warrant of arrest issued?

A There would be –

MR. STIX: Objection to the form of the question. That is not what her testimony was. Her testimony was she would be arrested. [35]

Q Is that what you said?

A That's right, I would be arrested if I did not go down and pay the bill to Bano Buick.

Q When he called back on the 11th, what did he say to you and what did you say to him?

A Is this the first time he called or the second time?

Q I'm talking about the call on the 11th. The first call to you was on June 28th, did you say?

A Yes.

Q So you called him on June 29th, then; is that right?

A Yes.

Q Did you call him from home?

Q Yes.

A Then on the same date he called you again, right?

A That evening again at about eleven o'clock.

Q He called you again at eleven p.m., right?

A Yes.

Q Or was it later than that? [36]

A It was about eleven p.m.

Q What did he say to you then?

A He asked me if I had gone to Bano and settled the matter.

Q What did you say?

A I said no, and I hung up.

Q That was the extent of the conversation?

A That's right.

Q He didn't say anything further about he is going to arrest you if you didn't pay?

A I just hung up the phone.

Q Did you have any further conversations with Detective McKenzie at any time?

A When he arrested me.

Q Nothing further until then?

A The next day I was arrested.

Q What time of the day was that?

A Approximately seven p.m.

Q Where at?

A At my home.

Q Who was present?

A When?

Q At the time of the arrest. [37]

A My husband was home.

Q And anyone else?

A And a neighbor was there.

Q Who was the neighbor?

A Rose Kuhn.

Q Where does she live?

A Right next door.

Q Anyone else?

A No.

Q Wasn't there another police officer there? Wasn't there a state trooper there?

A There was somebody else there, but I don't know who he was.

Q Did he come with Detective McKenzie?

A Yes.

Q Did you know Detective McKenzie prior to the first conversation you had with him?

A No.

Q You had never seen him before, had you?

A No.

Q They put handcuffs on you?

A Yes.

Q Where was that done? [38]

A In my driveway.

Q Did they come into the house?

A No.

Q Did they talk to your husband first?

A No, my husband came over to the car when I was standing there.

Q Did they knock at the door and you came to the door? Where were they when you first saw them?

A I believe—I was standing with my neighbor and I believe my husband was in the front of the house, and they saw him first. They pulled in. I think they asked us, "Where is Conway," or something.

Q What did Detective McKenzie say to you at that time, if anything?

A He said he had an arrest warrant for me, a warrant for my arrest.

Q Did you ask to see the warrant?

A I don't even remember to tell you the truth.

Q Did the other man say anything, the unknown man?

A No.

Q Were either one of them in uniform? [39]

A No.

Q What kind of car were they driving?

A I think it was dark blue. I don't know what kind it was.

Q Was it a marked car, or a police car?

A I don't remember.

Q Did any further conversation take place between you and Detective McKenzie or the other man?

A No, he showed me his—McKenzie showed me his I.D., or his badge, or whatever it was, and that was it.

Q Did he say he was going to take you down to the police station?

A Yes.

Q Was there a discussion about how you were to go?

A My husband asked if he could drive me, or if he could accompany me in the car, and the said no.

Q You were placed in the car with the police officers; is that correct?

A Yes.

Q Was there anybody else in the car besides Detective McKenzie and the other man? [40]

A No.

Q Then did your husband go down with you in his car?

A Yes.

Q Where were you taken?

A To the Mount Kisco Police Department.

Q Where is that located, do you know?

A I believe it's on Main Street, Mount Kisco.

Q Did you go in the front Main Street entrance?

A No.

Q Did you go in a different entrance?

A A side entrance.

Q Where did you go first?

A Well, down a corridor to—I guess it's where they arraign you. The sergeant's desk is there, or something like that.

Q Was there a sergeant behind the desk?

A Yes.

Q Do you know his name?

A No.

Q What happened there? What did he say to you and what did you say to him? [41]

A I guess he arraigned me, I don't know.

Q You don't recall any conversation?

A Not specifically. I mean he did whatever they do.

Q How long did that take?

A I don't remember exactly. I know he posted bail.

Q How did he do that?

A Told me that there was—I couldn't leave until I saw the judge, but if I wanted to post bail, it was five hundred dollars.

Q Did you say anything to him about that?

A I asked him when I could see the judge.

Q Yes?

A He said that he didn't know. There was a trial going on upstairs, and he didn't know how long it would take, so I would have to wait.

Q Then was Detective McKenzie and the other officer there, or the other man there?

A I don't—they were there briefly.

Q They were there briefly?

A Then a police matron was there.

Q Do you know her name? [42]

A No.

Q This was a woman, right?

A Yes.

Q Did that complete whatever took place at the police sergeant's desk?

A She had to search my purse, which she did.

Q Did she do that at the desk?

A Yes, in the same vicinity as the desk.

Q Did she search you?

A Yes.

Q How did she do that?

A She just, you know, went like that. [indicating]

Q She patted you down on the legs?

A You know, like this. I think I had on shorts or something, so there wasn't—you know. [Indicating]

Q Was this all done in the vicinity of the sergeant's desk?

A Yes, right there.

Q Then what happened, as far as you know?

A Then we just—we had to stay there, we had to wait. [43]

Q Did you have to wait there at the sergeant's desk?

A There were some seats right near the desk, and we sat there.

Q Did she stay with you, the matron?

A Yes.

Q What time did you arrive at the police station?

A I guess approximately seven-thirty, eight o'clock that evening, somewhere around there.

Q Eventually did you see the judge?

A Yes.

Q What time did you see the judge?

A Approximately one-thirty in the morning.

Q Where were you when you saw the judge?

A Upstairs.

Q In the courtroom?

A Like a little office or something.

Q Do you know the name of the judge?

A Yes.

Q Who was that?

A Bender.

Q Who? [44]

A Bender.

Q Between the time of your arrival and the time you saw the judge upstairs in his office, you spent most of your time then in the vicinity of sergeant's desk?

A Yes, behind the desk, in that area. Several hours later we went into—

MR. HENSON: Wait a minute, Mr. Stix, are you—

MR. STIX: Forget it, I just thought you wanted the complete – the way you asked your question, you didn't get a complete answer. It doesn't matter, you are asking the questions.

MR. HENSON: Would you read the question back please.

(At this time, the last question was read back by the reporter.]

THE WITNESS: I spent most of the time there.

Q Do you want to add something to what your previous answer was?

A Several hours later we went in the back. There was a detectives' room, and we went in there and sat. [45]

Q How long were you in the detectives' room?

A I'd say a few hours.

Q How long?

A A few hours.

Q Two hours?

A A few.

Q A few hours?

A Yes.

Q Who was present in there?

A My husband, the matron, and I'm not – there were other people, I don't know who they were. I guess detectives.

Q Were there chairs in there?

A Yes.

Q Did you have an attorney on that evening?

A No.

Q What did the judge say to you and what did you say to him?

A I guess he arraigned me, if that's what he does, and I showed him –

Q Do you understand my question? [46]

A You said what did he say to me, and what did I say to him?

Q Yes.

A I'm not sure exactly what he said to me. He said I am arrested.

Q Did he read a document to you?

A No, he just – it was an arraignment. I thought it was an arraignment.

MR. STIX: What did he say?

THE WITNESS: I am arrested, you know, "You are arrested," whatever, and I produced a document which I showed him.

Q You produced a document?

A I produced a document, a letter from my bank, yes.

Q Do you have that letter here?

A It's part of the file.

MR. STIX: Yes, we have that.

Q Do you have the envelope for this?

A No.

MR. HENSON: May we have this marked for identification as Defendant's Exhibit B. [At this time, said document is marked for identification as Defendant's Exhibit B.] [47]

Q Defendant's Exhibit B is the document you say that you showed to the judge?

A Yes.

Q Did he look at it as far as you know?

A Yes.

Q What did he say?

A He released me on my own recognizance, told me to appear in two weeks.

Q Did he mention anything about a charge against you?

A Yes, he had. There was a warrant for my arrest.

Q Did he mention anything else?

A I don't remember.

Q Did you receive Defendant's Exhibit B for identification by mail?

A No.

Q You went and picked this up from the bank, did you?

A Yes.

Q When did you pick it up? [48]

A The day—earlier that day when—the day that I was arrested, earlier that day.

Q Who did you speak to when you picked this up?

A Mr. Joseph Shane.

Q When did you talk to Mr. Shane about this?

A That day.

Q Had you talked to him about it before?

A I'm not sure if I called him to tell him I would like a letter explaining the situation in the event that I might get arrested.

Q You told him that you might get arrested?

A I told him I was threatened with an arrest.

A Was that the same day that you received this Defendant's Exhibit B?

A I believe so.

Q You didn't have any conversations with him before that?

A I'm not sure. I'm not really sure, I could have—I'm not sure.

Q Did you get an envelope with this?

A I don't remember.

Q Where has this been since you received it? Did you turn it over to your attorney? [49]

A Yes.

MR. HENSON: Was there an envelope with this, Mr. Stix?

MR. STIX: No, but that has been in my file since she first came to me.

MR. HENSON: When was that?

MR. STIX: Just before we made our first appearance in the Mount Kisco Justice Court on the criminal charge. She had been in sometime in July of '77.

Q Were you present when this was typed up?

A I was in the bank.

Q You waited for it to be typed up, did you?

A Yes.

Q Did you know Mr. Shane previous to this date?

A Only since I have had an account at the bank.

Q Did you see him on any problems with your account previously?

A No. [50]

Q Is this the only account that you had in this bank?

A No.

Q You have other accounts?

A Yes.

Q How many other accounts?

A Two.

Q Two others?

A Yes.

Q Savings?

A Yes.

Q You were to report back to the court two weeks later, were you?

A Yes.

Q At that time, did you report back?

A Yes.

Q Did you go back?

A Yes.

Q Who was with you?

A Mr. Stix and my husband.

Q Can you give me the date on that?

A I think it was two weeks from the date of the arrest. [51]

Q Would that be on June 30th, then when you were arrested?

A June 30 was the arrest.

Q Then you went to court on July 14, is that your testimony?

A I would guess so.

Q I don't want a guess.

MR. STIX: Whenever two weeks later—

A Whatever two weeks is from the date of the arrest, that's what I remember. I was to go back in two weeks.

MR. STIX: Just a moment, I will give her something to refresh her recollection.

MR. HENSON: Are we going to mark this?

MR. STIX: This is the plaintiff's bill of particulars. She is going to use it to refresh her recollection. These are the court dates.

MR. HENSON: I have not asked for that.

MR. STIX: All right, forget it. If you don't know [52]
the answer, say you don't know.

MR. HENSON: Mr. Stix, if you are going to start telling her answers to the questions, then we will have problems.

MR. STIX: Absolutely not. You are asking her leading questions. I am not objecting, but you are leading her.

MR. HENSON: I am asking her direct questions; dates, places.

A On that date of July 14, 1977, was the case adjourned further?

A I don't remember.

Q Did you appear in court on any subsequent date; yourself, personally?

A I would have to look, I don't recall. It was for two years.

A Do you have any system of keeping track of the dates yourself?

A No, I didn't keep track myself, personally.

Q How many times did you appear in court personally? [53]

A It was from July '77 to September, 1979, but I don't know how many times.

Q Would it be more than two?

A Yes.

Q More than five?

A Yes.

Q More than ten?

A Yes.

Q More than twenty?

A I don't know.

Q Would it be more than fifteen?

A Could be.

Q I show you this document marked Plaintiff's Exhibit 4 for identification on March 3, 1981, and I ask you to examine it and see if you have ever seen it before, or if you have ever had the contents of it read to you? [Showing it to the witness.]

A I never had it read to me.

Q Did you ever see it before?

A I think Mr. Stix has a copy.

Q When you first appeared in court on the day of June 30—was that June 30, 1977?

A Yes. [54]

Q —were you shown a copy of this?

A I don't remember.

Q This or a copy of it?

A I don't remember.

Q Could it have been approximately 8:58 p.m. when you arrived at police headquarters on the day of your arrest?

A 8:58?

Q Yes.

A I recall it being eight p.m., approximately.

Q Between the time of your arrest and to date, have you had any further communication from Detective McKenzie?

A No.

Q Other than consultation with Dr. Yapalater, did you consult any other doctor?

A No.

Q Did you take any medicines?

A No.

Q At the time you issued your draft for the car, did you know how much money you had in the account?

A Approximately. [55]

Q You had issued several drafts previous to that, had you not?

A I'm not sure.

Q Do you have your checkbook with you, that you used, at this time?

A No.

Q Do you still have possession of that checkbook?

A I'm sure I do.

Q Is this checking account for the purpose of personal items?

A Yes.

Q And household items?

A Yes.

Q When you make a deposit, is that your salary, or you make other kinds of deposits in here?

A It can be other kinds, it is not always salary.

Q Your last deposit, according to Defendant's Exhibit A for identification, was on May 3; is that correct?

MR. MATLIN: You mean the last deposit prior— [56]

Q Prior to the issuance of check number 154, that is the check here involved.

A Yes, that's right.

Q You don't know, and you have no way of locating a record of the dates on the issuance on the other checks prior to number 154?

A I don't understand the question.

Q You issued several checks prior to number 154, didn't you?

A If it is on that statement, I guess I did.

Q But this statement doesn't indicate the date of the check, does it, that only indicates the date it was paid?

A That's correct.

Q Do you have any record of the dates those other checks were issued?

A You mean do I have the checkbook?

Q Yes.

A I am pretty sure I do.

MR. HENSON: Would you produce that, or give us a photostatic copy of that checkbook, Mr. Stix?

MR. STIX: What period of time? [57]

MR. HENSON: From a period approximately a month before.

MR. STIX: I don't know about a month. Let me see the exhibit for a second.

MR. HENSON: I can't tell what your dates are on there.

MR. STIX: The date the check in question was drawn is May 10. I think a month before is fair. I will give it to a month before.

Q Do you have the checks that were forwarded to you with this statement? Do you have those with you?

MR. STIX: Yes, we do.

MR. HENSON: May we see them?

MR. STIX: Why don't you tell me which ones you would like to see.

MR. HENSON: I would like to see all of them that came with the statement.

MR. STIX: I say it's irrelevant, and I won't produce them. If you give me certain check amounts, I will let you see them. [58]

MR. HENSON: Let me have all the checks that are dated in May.

MR. STIX: [Handing them to counsel.]

MR. HENSON: Off the record. [Discussion off the record.]

MR. HENSON: May we have each of those marked as Defendant's Exhibits C, D, E, F, G and H.

[At this time, said checks are marked for identification as Defendant's Exhibits C through H respectively.]

Q [Continuing] Mrs. Conway, I show you checks marked Defendant's Exhibits C through H and ask you if those are your checks that you wrote and issued?

A Yes.

Q Were these issued on the dates indicated on the checks?

A That is the date the check was written. It may not have been mailed on that particular day.

Q Are you saying that each one of these checks were mailed? [59]

A Yes, I would assume so. Well, most of them.

Q Which ones were not mailed?

A Probably just this Lakeland Lumber check. It was probably not mailed.

MR. STIX: Referring to Exhibit D for identification.

MR. HENSON: D?

MR. STIX: D, yes.

Q Would they be mailed approximately on the date that is on the check?

A No, usually probably the next day or the day after.

Q If you would, look at your check marked Exhibit D.

A Yes?

Q That is check number 153, is it?

A Yes.

Q Do you usually write your checks in the order in which you come to them?

A Numerical order?

Q Yes.

A Yes. [60]

Q Was check number 153 written after checks 149, 150, 151 and 152?

A It was written before.

Q 153 was written before number 149 through 152?

A It's dated 4/7, so isn't that before?

Q Do you recall that, that was written before?

A No, I just noticed it by looking at it.

Q On Check number 153, the date is April 7; isn't that correct?

A Right.

Q Is it possible that that is an error, or do you recall?

A I don't recall.

Q But your usual habit is not to jump ahead and write 153 before you write 149; is that correct?

A That's correct.

Q To whom is that check written, 153?

A Lakeland Lumber.

Q Having examined the check now in further detail, does that refresh your recollection as to how that April 7 is written in there, that that check was dated before the lower numerical numbers? [61]

A No.

Q Do you recall making that purchase?

A I don't recall.

Q I believe you told us it was not mailed?

A I don't have an account with them, so I wouldn't think so.

Q Do you recall going to Lakeland Lumber for any kind of material?

A No. I obviously did, I don't recall.

Q Do you have a receipt any place from Lakeland Lumber for that check?

A No.

Q Did you write the check?

A Yes.

Q Did your husband buy anything from Lakeland Lumber, that you recall?

A I don't recall.

Q May I see it, please?

A [Handing it to counsel.] It's possible—

MR. STIX: There is no question before you.

THE WITNESS: Okay.

Q I draw to your attention the payment check on the back of the draft, and it would seem to indicate May 9, 1977 that it was paid; is that correct? [62]

MR. STIX: I'm going to object to the form of the question.

Q If you would look at the back of that check and look at the payment stamp.

MR. STIX: Let's just say there is a date on there.

MR. HENSON: I am not asking about that.

Q I'm asking you now, Mrs. Conway, does that refresh your recollection as to when you wrote the check?

A No.

MR. HENSON: We agree that the stamp shows that that check was paid on May 9?

MR. STIX: No, we don't agree. You are telling us that is a payment stamp. There is a date on the back. It says May 9, 1977.

MR. HENSON: It shows paid underneath that, doesn't it?

MR. STIX: Underneath in a box it says pay any bank, P.E.G. There is a date, May 9. Frankly, I don't know—we don't know that is a payment stamp. [63]

Q We do know that check number 154 was issued on May 10, don't we?

A I don't know that.

Q You wrote the check, didn't you, when you picked up the car?

A I don't have check number 154, I don't know.

MR. STIX: That is the one with Bano Buick.

THE WITNESS: I don't have that check, so I don't even know.

Q I show you Plaintiff's Exhibit 1 for identification, and I ask you again what date you wrote that check?

Q I believe you told us it was not mailed?

A I don't have an account with them, so I wouldn't think so.

Q Do you recall going to Lakeland Lumber for any kind of material?

A No. I obviously did, I don't recall.

Q Do you have a receipt any place from Lakeland Lumber for that check?

A No.

Q Did you write the check?

A Yes.

Q Did your husband buy anything from Lakeland Lumber, that you recall?

A I don't recall.

Q May I see it, please?

A [Handing it to counsel.] It's possible—

MR. STIX: There is no question before you.

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MR. STIX: Let's just say there is a date on there.

MR. HENSON: I am not asking about that.

Q I'm asking you now, Mrs. Conway, does that refresh your recollection as to when you wrote the check?

A No.

MR. HENSON: We agree that the stamp shows that that check was paid on May 9?

MR. STIX: No, we don't agree. You are telling us that is a payment stamp. There is a date on the back. It says May 9, 1977.

MR. HENSON: It shows paid underneath that, doesn't it?

MR. STIX: Underneath in a box it says pay any bank, P.E.G. There is a date, May 9. Frankly, I don't know—we don't know that is a payment stamp. [63]

Q We do know that check number 154 was issued on May 10, don't we?

A I don't know that.

Q You wrote the check, didn't you, when you picked up the car?

A I don't have check number 154, I don't know.

MR. STIX: That is the one with Bano Buick.

THE WITNESS: I don't have that check, so I don't even know.

Q I show you Plaintiff's Exhibit 1 for identification, and I ask you again what date you wrote that check?

A 5/10/77.

Q That is the day you picked up the car, isn't it?

A Yes.

Q There is no doubt that check number 153 was issued prior to May 10, 1977; isn't that correct? [64]

A It appears that way.

Q You have no recollection otherwise, do you?

A I have no recollection at all.

Q So that at the time you issued the check 154, check number 151 and 153 had already been issued; isn't that correct?

A Yes.

Q When you issued the check to Bano Buick on May 10th, did you have your checkbook with you?

A No.

Q You just carried this check in your pocket?

A I just took the check.

Q When did you take the check?

A I don't—what do you mean?

Q When did you take it from the checkbook?

A On the way to Bano Buick, when I went down there.

Q Did you check your balance according to your checkbook at that time?

A I don't remember.

Q Do you know whether you were overdrawn, according to your checkbook, on the date you issued that check on May 10, 1977? [65]

MR. STIX: Note my objection to the question. I think it's irrelevant and immaterial. Go ahead and answer the question.

THE WITNESS: I forgot the question.

MR. HENSON: Read it back. [At this time, the last question was read back by the reporter.]

THE WITNESS: I would think that I wasn't overdrawn.

Q Previous to the issuance of the check, you had the conversation with them about the engine, isn't that correct, and whether or not this engine was authorized, and whether it was the engine that was supposed to be in there?

A You mean when we arrived there?

Q Yes.

A Yes.

Q Nevertheless, you issued your draft?

A Yes.

Q At the time you issued the draft on May 10, did you intend to stop payment on it? [66]

A No.

Q Even though you questioned whether this was the right engine to be in there?

A Yes.

Q Is that correct?

A Yes.

Q Even though you had raised this issue with them?

A Yes.

Q Even though you had raised this issue with them?

A Yes.

Q You nevertheless paid for it?

A Yes.

Q With a check?

A Yes.

Q You say that you had no intention of stopping payment on that check at that time?

A No.

Q Did you go to any hospital after this incident?

A No.

Q Did you lose any time from work?

A Yes.

Q What was that? [67]

A Yes.

Q What dates?

A Shortly after the—I don't know the exact dates right now, shortly after the arrest.

Q The arrest was on June 30, is that right?

A Yes.

Q How long did you lose time from work?

A I lost a few days here and there intermittently

Q You don't know the dates?

A Not right now I don't.

Q Did you ever give them to your attorney?

A I told him the dates. I mentioned to him the dates. I have it at my office. I have it there.

Q Would you get the dates for us?

A Yes.

Q We will leave a space and you can fill them in?

A All right.

_____

_____

_____

Q Did you keep those records in the office when you lost time? [68]

A No.

Q You mean the records just show when you don't come in?

A Yes.

Q Were you paid for those days when you didn't come in?

A Yes.

Q What kind of record is it that is kept on this?

A Where?

Q In the office?

A Just we have a sheet on each person that indicates when they are not—you know, when they don't come in, or they are late, or whatever.

Q Is this record kept in chronological order?

A Yes.

Q What period of time was it that you lost a few days here and there, more than a month?

A No.

Q Within a few weeks of that, a few weeks of June 30?

A Yes. [69]

MR. HENSON: May we have copies of those sheets covering that time frame?

MR. STIX: No. We will give the dates. Those are not within our control. We will give you the dates. I'm not going to sit here and tell you we can get it from the doctor's records.

MR. HENSON: All I want is a copy.

MR. STIX: We are not going to remove them without his permission.

Q Would you ask Dr. Yapalater if he will be kind enough to furnish us with a copy of those records?

A Yes.

Q Is there anything else on those records other than the dates?

A The reason.

Q The reason?

A The reason why the person is not in.

Q What else is on the record?

A I believe that's all.

Q Do you mind furnishing us then, if you can't get a copy of the record, would you look at it and give us the reason exactly as it is written in the record? [70]

MR. STIX: We will try to get you the record. I just don't want to tell Dr. Yapalater what his office procedures are.

MR. HENSON: Dr. Yapalater is very conversant with court procedures and subpoenas.

MR. STIX: He sure is.

Q Are you telling us that the reason that you had to take a day off here and there was because of court appearances?

A No.

Q What was the reason?

A Because I was emotionally upset.

Q What did you do when you were emotionally upset? Did you stay at home, or what did you do?

A I would cry. I was—if I was home, I would stay at home and cry.

Q Anything else?

A I was depressed, nervous.

Q Were you under the care of any doctor at this time for any kind of condition? [71]

A No.

Q Who was your family doctor?

A Well, I have changed since that time, but—

Q At that time, who was your family doctor?

A It was Walter Sonnenborn.

Q Would you spell that.

A S-O-N-N-E-N-B-O-R-N, 170 Maple Avenue.

Q What was that last part, S-O-N?

A S-O-N-N-E-N-B-O-R-N, M.D., 170 Maple Avenue, White Plains.

Q Is he retired?

A No, not yet.

Q Who is your present family doctor?

A Sheldon Alter, Davis Avenue, White Plains.

Q When did you start seeing him?

A I believe last August of '80.

Q But that was for matters totally unrelated to this incident?

A Right.

Q After this incident, were you caused to be denied credit any place as a result of this incident? [72]

A No.

Q As far as you know?

A No.

Q Did any of your friends refuse to speak to you after this?

A No.

Q No loss of friends, then?

A No.

Q You weren't forced to resign from any clubs?

A No.

Q Were you struck by anybody while you were in custody?

A No.

Q Were you injured in any way while you were in custody?

MR. STIX: Physically injured?

A Physically?

Q Yes.

A No.

Q By whom were you humiliated, if anybody?

A Neighbors.

Q Which ones? [73]

A They gave me odd looks.

Q Who?

A I said some of my neighbors gave me some odd looks.

Q Which ones?

A Mostly the ones who live right near me across the street.

Q Rose?

A No, not her.

Q Across the street, what is the name?

A Habich.

Q The first name?

A I don't—I'm not sure, I don't know the first name.

Q Do you see them socially?

A Occasionally.

Q Since this occurrence?

A No.

Q Anyone else?

A Not in particular.

Q Did you communicate with any newspapers after this incident?

A You mean right after? [74]

Q Any time afterwards?

A Yes.

Q Who did you speak to?

A I don't remember.

Q Which newspaper?

A The Reporter Dispatch, I think.

Q You don't know who you talked to?

A I don't remember his name.

Q Did you write to the newspaper?

A No.

Q You just called them up and spoke to them?

A No.

Q How did this communication take place then?

A He called me.

Q Then did you talk to him?

A Yes.

Q Did you have any communication with him prior to this date?

A No.

Q Is that the only communication you ever had?

A Yes.

Q What was the date? [75]

A I don't remember.

Q Was it a short time after this incident?

A I think it was some time last year.

Q In 1980?

A '80, yes.

Q Would that be a short time prior to July 29, 1980?

A Could be.

Q As a result of that, did an article appear in the newspaper?

A Yes.

Q Was that written by Andrew Lashley? Does that sound right?

A It sounds familiar.

Q At that time, did you tell Mr. Lashley who your attorney was?

A Yes.

Q Did you direct him to your attorney?

A Yes.

Q Did you give him any details at all as to what transpired?

A I believe I did.

Q Did you tell him that you brought your automobile to Bano Buick to have the engine replaced? [76]

A I believe so.

Q Was that true at the time you told him that?

A Was what true, that I had taken it there?

Q Was it true that that is the reason you took the automobile there?

A I took it there to have the car repaired.

Q My question is, did you tell Mr. Lashley that you took the car there to have the engine replaced?

A No.

MR. STIX: Do you want to mark that newspaper for identification?

MR. HENSON: I don't want to mark it. If you want to mark it, if you insist on it, it's all right with me, I have no objection to it.

MR. STIX: I would like to have it marked.

MR. HENSON: I didn't use it, I asked her questions. I didn't use the newspaper. I framed my questions without reference to the newspaper. [77]

MR. STIX: You do have an objection?

MR. HENSON: Well, Mr. Matlin has an objection. You have a copy of the article.

MR. STIX: You opened the door. If you don't want to, it's all right.

MR. HENSON: You know which one it is. There is no question about that.

MR. STIX: Off the record. [Discussion off the record.]

MR. HENSON: I have no further questions.

EXAMINATION BY

MR. MATLIN:

Q At the time that Detective McKenzie and this other individual who you weren't able to identify arrived at your house, where were you?

A I was standing with my neighbor, sort of like in between our two properties.

Q You were outside your home?

A Yes.

Q Was your husband also outside the home?

[78]

A Yes.

Q Did you have a conversation with Detective McKenzie at the time of your arrest?

A Not really a conversation.

Q Did he indicate to you that he was there for purposes of arresting you?

A Yes.

Q Did you have occasion, after he notified you of this, to go back into your home at any time?

A No, I don't think so.

MR. STIX: Let her think about it.

Q So you left directly with Detective McKenzie and the other officer in the car, which I believe you described as a dark blue car?

A I am trying to think if I changed my clothes or not. I don't remember.

Q Let me ask you this, if this refreshes your recollection. You indicated that at the time that the matron patted you down, you were wearing shorts. Was that the outfit you were wearing at the time that Detective McKenzie arrived?

A I don't remember.

Q Do you have any recollection of going back into your home after Detective McKenzie arrived? [79]

A I thought about it, but I'm not sure. I thought I went back in to get the letter that I took with me.

Q Did Detective McKenzie come into your home at any time?

A No.

Q And from the time you arrived at the Mount Kisco Police Station, until the time you were arraigned before Judge Bender, did you spend any time in a jail?

A You mean in a cell?

Q In a cell, yes.

A Only to go to the bathroom

Q At all other times, you were then either in front of the sergeant's desk or —

A I was behind it.

Q You did say behind it. Were you sitting in an area where there were bench type seats?

A I think there were chairs.

Q Could you describe when you were sitting in this area, what was directly in front of you?

A We came in a side door, okay, walked down a corridor, and the sergeant that I saw was like here. We just sat right there. I guess it was just behind that area. You know how it looks when you come into the police station. I think you walk in and they are on the left. We were behind that, on the inside. [80]

Q The balance of the time, if you weren't there, you were in one of the offices?

A I guess in a detectives' room.

Q Subsequent to your being arraigned, you appeared, you said, on the 14th of July?

A Say that again?

Q Subsequent to your being arraigned in front of Judge Bender, you were told to appear—

A Two weeks.

Q Two weeks later?

A Yes.

Q You appeared at that time?

A Yes.

Q Who was the judge before whom you appeared?

A It was one of the Cerbones, but I'm not sure which one.

Q You appeared with counsel?

A Yes. [81]

Q Was the District Attorney there?

A No.

Q There was nobody from the District Attorney's Office?

A No.

Q Was Mr. Martabano there?

A I'm not sure.

Q When subsequent to your arrest for the first time, if any time, did you see Mr. Martabano, either this gentleman sitting here, or Alfred V. Martabano?

A Before I was arrested?

Q Subsequent to your arrest.

A After I was arrested?

Q Yes.

A I saw them in court occasionally.

Q Did you have occasion at any time to speak with them?

A No.

Q Did you instruct your attorney at any time to speak to them?

A No, I didn't instruct him to.

Q Do you know if he did? [82]

A No.

Q Do you know if there came a time when an offer was made on your behalf, through your attorney, to settle the issue?

A I believe there was a letter or something at one time.

Q Do you know what the contents of that letter were?

A I don't remember.

Q Forgetting the letter itself, do you know what the basis for the offering settlement was?

A I don't remember.

Q Did there come a time when you offered to pay Bano Buick the $431 in exchange for dismissal of the criminal action against you?

A I believe that we thought about it.

Q Do you know if such an offer was made?

MR. STIX: By who?

Q By anybody?

A I'm not sure.

Q Did you ever instruct your attorney to make such an offer?

A I didn't instruct him to. [83]

Q Did he ever indicate to you that he had made such an offer?

A We discussed it.

Q You are avoiding my question. Did he ever indicate to you as to whether or not he had made such an offer?

A I just knew there was a letter. I'm not sure if it was a formal offer.

Q Had you seen this letter before it went to any third party?

A I don't remember.

Q When you went back to speak with Mr. Shane, I believe you indicated you requested a letter from him regarding the status of your account on May 10?

A No, I requested a letter explaining that I did not have insufficient funds regarding the check to Bano Buick, that it was a stop payment; that the bank had made an error.

Q What did Mr. Shane do when you made that request, prior to issuing a letter?

A He didn't do anything.

Q Did he direct his secretary to do something? Did he do anything, or did he just issue a letter? [84]

A Yes, I believe his secretary typed a letter.

Q What period of time elapsed from the time you made this request of Mr. Shane until you received this letter?

A Fifteen minutes, twenty minutes.

Q You made the request of Mr. Shane in person?

A Yes.

Q Were you able to see Mr. Shane at all times, from the time of the request until the time you received the letter?

A Yes, I walked in and I explained—I sat down and explained the situation to him.

Q You sat at a desk or in a chair?

A I sat in a chair.

Q Was he behind his desk?

A Yes, I believe so.

Q After you made this request of him, what did he then do?

A He instructed someone to type it, to type a letter.

Q Was that all he did? [85]

A Yes.

Q Did he dictate the letter?

A I don't remember.

Q The letter was then presented to him?

A Yes.

Q He signed his name?

A Yes.

Q He handed you the letter?

A Yes.

Q Did there come a time during the period of time you were making appearances in court, when a District Attorney, or Assistant District Attorney of the County of Westchester, became involved in this criminal charge?

A I believe about a year after it had started, someone by the name of Rawley was involved.

Q Do you know who prior to that was prosecuting the criminal charge?

A No.

Q Was anybody prosecuting the criminal charge?

A I don't know.

Q Did you have occasion at any time to present Mr. Shane's letter to the court, other than the time you said you gave it to Judge Bender, or showed it to Judge Bender? [86]

MR. STIX: I will object to the question. It is calling for knowledge of certain legal matters before the court that as a layman she doesn't know, but if she can answer it, go ahead and answer it, if you know.

A I don't know.

Q Subsequent to June 30, 1977, and before your appearance on July 14, 1977, did you, or did you instruct your attorney to present that letter to Mr. Martabano, or anyone else connected with Bano Buick?

A We discussed the letter. I didn't instruct him to do it, we discussed it.

Q Do you know whether or not at any time from June 30, 1977, up to the date of your first appearance in court, whether or not Mr. Martabano, or anyone connected with Bano Buick, was informed, or received a copy of Mr. Shane's letter?

A I don't know.

Q Did you ever ask your attorney to contact Bano Buick, or someone from Bano Buick, to discuss with them Mr. Shane's letter? [87]

A That had already been done.

Q When was that done?

A During the time that my husband had been talking to Mr. Martabano about settling this matter.

Q Was that done by you?

A No.

Q So you don't have any personal knowledge as to whether or not that occurred?

A Well, the first phone call from Mr. Martabano I took. I was home.

Q Yes?

A He told me that the check had bounced, and I told him that that check did not bounce, that it was a matter of stopping payment.

Q Did you ever at any time forward a copy of Mr. Shane's letter, or instruct your attorney to forward a copy of Mr. Shane's letter, to Bano Buick?

A I don't remember.

Q Do you have any recollection of delivering a copy of Mr. Shane's letter to Mr. Martabano, or anyone else connected with Bano Buick?

A I don't remember. [88]

Q At the time of your arrest, did you present a copy of Mr. Shane's letter to Detective McKenzie?

A Yes.

Q Did he ask to xerox it, or make a copy of it?

A In my driveway?

Q No, I didn't ask you that. Did he ask you—

A You said at the time of the arrest. That was in my driveway.

Q That date.

A That day?

Q Yes.

A I don't believe—no, as far as I know, he just saw it in my driveway when he came. He never saw it again. He read it there.

Q He read it there?

A Yes.

Q You say you presented that letter to Judge Bender at the time of your arraignment?

A Yes.

Q Do you recall what if anything he said upon seeing that letter? [89]

A He laughed, and said that he would release me on my own recognizance, to come back in two weeks.

Q Did he make any statement whatsoever regarding the charge against you?

A No.

Q Do you recall if he read you the charge?

A I believe he did.

Q You said when you issued the check, check number 154, to Bano Buick, you had no intention of stopping payment?

A No.

Q I believe you also said that upon starting the car up, the alternator or generator light was on immediately?

A I didn't say starting it up, I said when I drove the car—as I was driving the car, the lights went on, whichever light it was.

Q You drove the car from Bano Buick to your home?

A Yes.

Q Approximately how long a drive is that, if you know, [90]
in terms of miles?

A I'd say it's about fifteen minutes, so it's about fifteen miles.

Q What was the route that you took from Bano Buick to your home?

A I don't remember.

Q Did you go on Interstate 684?

A I don't remember.

Q Had you been to Bano Buick on more than one occasion?

A Just the first repair in January.

Q Do you recall what route you took from Bano Buick to your home at that time?

A No.

Q When did you first notice the light go on after entering the automobile at Bano Buick?

A I'd say after I was driving for maybe a mile or so, something like that.

Q The light stayed on the entire time?

A Yes.

Q Until you arrived home?

A Yes.

Q When you arrived home, did you notify Bano Buick? [91]

A No.

Q Did you notify them the following day?

A No.

Q When for the first time did you speak to anyone from Bano Buick subsequent to picking up the car?

A Repeat that again?

Q When for the first time subsequent to picking up the automobile, did you speak to anyone from Bano Buick?

A When Mr. Martabano called.

Q Is that Mr. Martabano sitting here?

A I believe so.

MR. MATLIN: That's Alfred Martabano, Sr.

Q It was Mr. Martabano that initiated the telephone call?

A Yes.

Q When for the first time did you notify Bano Buick that you had stopped payment on the check?

A When he called.

Q How long after you had picked up the car was that [92]
when Mr. Martabano called?

A I don't know.

Q Would it be more than a week?

A Possibly a week, ten days, something like that.

Q Approximately a week to ten days?

A Yes.

Q You indicated that when you came to pick up the car, you questioned the service manager and wanted to know what year engine was in the car?

A Yes.

Q Were you aware at the time that you asked that question that the engine was different than the engine that you had brought the car in with?

A The service manager said they put in a different engine.

Q When for the first time did you know that they put in a new engine?

A Earlier that day.

Q Was this by way of a telephone conversation?

A Yes.

Q At the time of that telephone conversation, was that conversation with you?

A No. [93]

Q It was with your husband?

A Yes.

Q When you came to pick up the automobile, were you aware as to what the amount of the charges were? Did you know how much the bill was?

A Yes, approximately.

Q Who had told you how much the bill was?

A No one told me, it was a conversation with my husband.

Q Who was that that told you?

A The service manager.

Q When did he tell you?

A When I arrived there.

Q Did you have knowledge of approximately how much the bill was prior to your arriving there?

A Yes.

Q Who told you that?

A No one told me that, they told my husband.

Q And he told you?

A Yes.

Q So your husband informed you as to how much the bill was?

A Yes.

Q Did he tell you exactly how much the bill was? [94]

A I don't recall. It was $430.

Q You might not have know what the cents were, but you knew it was $430?

A Yes.

Q You knew that before you arrived to pick up the automobile?

A Yes.

Q You took with you a check?

A Yes.

Q With the intention of paying for that bill?

A Yes.

Q You did pay that bill?

A Yes.

MR. MATLIN: I have no further questions.

MR. HENSON: I just have a couple of questions.

MR. STIX: off the record. [Discussion off the record.]

MR. HENSON: I have just one or two questions. [95]

EXAMINATION BY

MR. HENSON:

Q At any time did you send a copy of Mr. Shane's letter to the Village or to Detective McKenzie?

A I don't know.

Q When you showed the letter to Detective McKenzie at the time of your arrest, what did you do, hand it to him?

A Yes.

Q You saw him look at it?

A I thought that I wouldn't be arrested because I had the letter.

Q He looked at it?

A He read it.

Q Did he read it out loud?

A I don't think so. I handed him the letter.

Q You saw him –

A I was saying this is a big mistake, this is a letter to tell you it was a big mistake.

Q You saw him looking down at it?

A He read it. He said, "It means nothing, I have a warrant for your arrest." [96]

MR. HENSON: I have no further questions.

MR. MATLIN: No further questions.

MR. STIX: I have no questions.

• • •

LYNN CONWAY

Subscribed and sworn to before me this day of , 1981.

JEFFREY CONWAY, one of the plaintiffs herein, having first been duly sworn by Philip E. Picker, a Notary Public of the State of New York, was examined and testified as follows: [97]

EXAMINATION BY

MR. HENSON:

Q What is your full name?

Q Jeffrey Michael Conway.

Q Your address?

A Lakeview Drive, North Salem, New York.

Q Mr. Conway, are you one of the plaintiffs in the action against Bano Buick and others?

A Yes.

Q Are you married to Lynn Conway?

A Yes, I am.

Q How many cars do you have?

MR. STIX: At what point in time?

MR. HENSON: At –

A At the present time?

Q On June 30, 1977.

A At that time, I had two cars.

Q What kind were they?

A I had an old Volkswagon that we used when necessary, and the Opel. [98]

Q The Opel is the one with which we are concerned in this action; is that correct?

A Right.

Q What year was it, do you remember?

A The Opel?

Q Yes.

A '73.

Q Did you buy it new?

A I bought it secondhand from my mother-in-law.

Q What is her name?

A Marge Sorba

Q Where does she live?

A Stamford, Connecticut.

Q The address?

A I don't have the street address.

Q Can you get it and fill it in for us?

A Sure.

Q How much did you pay for it?

A I'd have to check on that, I'm not quite sure.

Q Do you have a record that would indicate it? [99]

A Yes.

Q Did you pay by check or cash?

A I believe we gave her a check.

MR. HENSON: May we have a copy of the check?

MR. STIX: No, we will fill in the amount. I don't think that is relevant.

A _____

THE WITNESS: It's many years ago, and I may have given her cash, but you will get the exact amount.

MR. HENSON: The check is refused?

MR. STIX: Yes.

Q At the time you purchased it, was it in good condition?

A It was only a year old, and she is the only one that drove it. It was in perfect condition.

Q Between the date of purchase and approximately May 10, 1977, did you have any major problems or repairs?

A No, the only major problem I had with the car was the first time it was repaired by Bano Buick.

Q That was in January of 1977? [100]

A Yes.

Q What was the nature of the repairs?

A The nature of the repairs, as it was explained to me by Bano Buick, was related to the cam and the engine. I am not a very good mechanic myself, but that is what was explained to me.

Q Who did you speak to?

A I spoke to the mechanic and the service manager.

Q Do you know the name –

A Ken Bradco was the mechanic.

Q B-R-A-D-C-O?

A I believe so.

Q And the service manager?

A Richard – however you pronounce his last name.

Q What did he look like?

A Forties, medium build.

Q What color hair?

A I really don't know. This is many years ago, and I – Ken Bradco, or the –

Q No, the service manager.

A I'm not sure what color hair he had. [101]

Q What is your occupation, sir?

A My occupation is real estate.

Q Are you associated with a firm?

A Yes, I am, Realty Notice Associates in Somers.

Q Realty World?

A Yes.

Q Notice Associates?

A Yes.

Q Is that a corporation?

A Yes, it is.

Q Are you a stockholder?

A No, I am not.

Q How long have you been associated with them?

A The past six months I have been with them.

Q On the date of this occurrence in May and June of 1977, with whom were you associated? What were you doing?

A At that time I was just — I was just starting real estate.

Q Is that when you started with these people?

A No, I was working for them for six months.

Q Who were you associated with in 1977? [102]

A Holly Real Estate in Lake Carmel.

Q Did you have a regular service station that you went to previous to May 10 of 1977, with this Opel?

A No, not really. Let me make one correction. I just thought — I either had the Volkswagon or the Oldsmobile in '77.

MR. STIX: To the best of your memory.

THE WITNESS: I think it was a Volkswagon.

MR. STIX: Then that is what it is.

THE WITNESS: I don't know, I could have made that mistake.

Q In 1977, you don't recall where you were buying your gas and getting your service for your cars?

A Well, I have a Shell card and a Mobil Card; wherever I might be at the time. I do quite a bit of driving.

Q You don't go to any service station near where your home is?

A Not on a steady basis. I drive over thirty thousand miles a year, so — [103]

Q What is the nature of your duties requiring that much mileage?

A Real estate.

Q All over Westchester County?

A Westchester, Putman and Dutchess.

Q At that time, were you driving the Opel?

A No. It was the better of the two cars, so my wife was taking it to —

Q You were driving the Volkswagon?

Q — to the office, and occasionally I was using it. I was also using my broker's car at the time, his Oldsmobile. He was more or less breaking me in.

Q In due course, this Opel broke down, did it, on 684?

A Yes, it did.

Q Were you present when it broke down?

A No, my wife called me at home and said that the car just seemed to have seized, it would not start or turn over, would I come down.

Q So you went down?

A So I went down. [104]

Q Did you have a tow truck tow it?

A Yes.

Q Where did you tow it to?

A Bano Buick, because we were familiar with the mechanic there at one time.

Q What mechanic was that?

A Mr. Bradco.

Q Was that by reason of previous repair work?

A My wife — when he worked in White Plains, had an earlier Opel that he used to work on, yes.

Q Wher was that?

A Sholz.

Q Sholz Buick?

A Yes.

Q When you towed it in, did you speak to Mr. Bradco?

A No, the car was just towed over there, and I spoke to him on the phone and said, needless to say, "Fix the car, le: me know what is wrong with it."

Q Did he tell you at that time what the problem was? [105]

A He said it was related to the cam. He knows I am not much of a mechanic.

Q You got a bill and picked up the car and paid the bill, right?

A Yes, $198.

Q Do you have that bill?

A I believe we do.

Q If you would look for it, and if you have it —

A Yes.

MR. STIX: Wait a second.

A One hundred ninety something.

MR. STIX: I think it has already been marked as an exhibit.

MR. HENSON: May we see it and mark it?

MR. STIX: Yes, you may. It has already been marked Plaintiff's Exhibit 9 for identification on 3/3/61.

Q Did he mention anything to you about the cylinder head and cleaning it for carbon, as well as the cam shaft?

A Not that I recall. He said it was internal problems, something to do with the cam. As I said, he knows me not as a great mechanic. I know basics, but once you get to the interior of the engine, he would be talking French to me. [106]

Q Plaintiff's Exhibit 9 for identification of 3/3/81 is what you received and you paid that bill; is that correct?

A Yes.

Q Between the date of the payment of that bill in January of 1977, and May 10, 1977, did you have any further problems?

A Well, in April, the car blew up, and I asked if that was related to the damage, and I was told the cam has nothing to do with the engine blowing up, and some other people say yes, it does. It's the heart of the engine. That was in April.

Q You understand, don't you, sir, that I just want what you know about yourself, is that correct?

Q Sure.

MR HENSON: I will move to strike that as not responsive, what other people told him.

Q You said that the car blew up?

A Yes. [107]

Q Were you present at this time?

A No. Once again, my wife called me from 684 and said that the car had seized, and I found out from Bano Buick that the engine –

Q Just were you present, sir?

Q No.

Q You were not present?

A No.

Q You had a conversation with your wife?

A Yes. She called me for assistance.

Q You went and looked at the car?

A Yes.

Q What did you see, sir?

A I saw that the car would not start, would not turn over. The engine was evidently seized from what I know of engines. The car was once again towed back to Bano Buick.

Q You had it towed back to Bano?

A Because they did the previous work, and I was told the engine blew up, it was no longer any good, I needed another one.

Q Who told you that, somebody at Bano?

A Yes. [108]

Q Was it Mr. Bradco?

A I believe the service manager, because he offered an engine, but –

Q Did that take place at Bano Buick?

A That was over the phone.

Q Did you recognize the man's voice as that of the man you talked to before?

A Yes.

MR. HENSON: Off the record.

(Discussion off the record.)

Q Do you know when he told you that? Was that the day after the car was towed in, or when was it?

A I couldn't swear if it was the day after, but evidently as soon as he could have gotten to it.

Q He called you at home, did he?

A No, I called him back to see what the extent of the repair may be, and where I stood, because we were at a desperate period for cars.

Q That was in April, correct?

A Yes.

Q Do you have anything to indicate the date in April when that occurred? [109]

A No, I do not, not that I can think of at the moment.

Q Did you eventually get a bill from Bano Buick for the repair of this car on the damage that occurred in April?

A For the new engine they put in, you are referring to?

Q Whatever was done, did you get a bill from them?

A Yes. They presented me with a bill when I went down. They told me they put the engine in the car without any authorization.

Q I just asked you if you got a bill.

A Yes, they presented me with a bill at that time.

MR. STIX: It was been previously marked Plaintiff's Exhibit 10 for identification on 3/3/81.

Q Is this the bill that was presented to you, sir? (Showing it to the witness.)

A Yes, this is the bill.

Q Do you know what date it was presented to you? [110]

Q 4/15/77.

Q Where was it presented to you, sir?

A In the shop.

Q Was this within a day or so after the car became disabled on 684?

A No, this was a good time after that, four to six weeks.

Q Four to six weeks afterwards?

A We were looking for an engine at a reasonable price.

Q Just a minute, sir. The car broke down on 684?

A Yes.

Q On some date?

A Yes.

Q Can you give me a date on that, approximately?

A Early April, I would say. I will try to find records to back that up.

MR. STIX: Leave a blank in the transcript, and he will fill in the date.

THE WITNESS: But it was a considerable time until the other engine was put in. [111]

A _____

Q Did you go down and see it while it was on 684 the second time?

A Yes.

Q You didn't go back to Bano Buick that day with the car then?

A No.

Q Then you called up, and as I understand it, you were told what was the problem?

A Yes, as the bill reflects.

Q At that time, what did you say to him and what did he say to you?

A Okay. The service manager told me, "Mr. Conway, I know where there is an engine for $550," and I thought that was a little bit high for a four cylinder engine. I said, "Forget that engine, I am going to look around for one as well, and I would appreciate it if you would look around for one, and if you find one first, at a reasonable price, you call me, and if I find one before you, I will call you and tell you what I have found." I did in fact find one at Croton Falls Auto Wreckers for $250. I called him up to tell him I was going to have it delivered to Bano Buick. [112]

Q When did you make that call?

A The exact time that they told me that – you see, I called him and I said, "I got the engine, I am just verifying the fact. I am sending it down. I am going to have it delivered to you from Croton Falls, It's costing me $250."

Q Who in Croton Falls was this that furnished you with the engine?

A The owner. He showed me the car. He showed –

Q His name?

A I don't know his name offhand, but –

Q Did you pay him for it?

A No, no. He showed me the car, and he – because the engine was still in the car, so he could show me the mileage. It looked presentable. It was a '73, so when I called him to tell Bano the engine is coming, the man said, "Oh, I'm glad you –" by man, meaning the servie man – he said, "I am very glad you called, we are ready to start your car." I said, "What do you mean [113]
by start my car, I didn't authorize you to put the engine in. I am calling you to tell you I am sending an engine down." He said, "We already put one in," so at that point, I went down to see the car, and the engine looked very old to me, and I had seen that engine at Bedford Auto Wreckers for $100 and turned it down. It had too many miles on it.

Q Who did you see at Bedford Auto Wreckers?

A I don't know, I forget his name, a strange name.

Q Was it the owner?

A In the junkyard. I don't know, Tony or something, something like that.

Q Did you write down an engine number on it when you say it?

A No, I didn't, but I did examine all the engines in the area.

Q How many engines did you look at at Bedford Auto Wreckers?

A Just the one. I only found about five in the entire area.

Q Where else did you see them?

A Most of them by phone, and I would ask –

Q You only saw the one at Bedford then? [114]

A And the one in Croton Falls that I had picked out. You see, most engines at junkyards are taken out of the cars, so when I called up, when the engine was out of the car, I couldn't check the mileage.

Q The one you saw at Bedford Auto was out of the car then?

A No, the one in Bedford Auto was in the car. It just had high mileage on it and it was a '71 engine, and this was a '73 car. I wasn't going to devaluate the car.

Q The one that you saw in Croton Falls, what year was that?

A That was a '73.

Q What date did you see the man in Croton Falls?

A The same day I picked up the car. I'm sorry, it was the day before.

Q That would be on or about May 9?

A I picked up the car on the 10th. It was the day before.

Q I'm asking you, the day before you picked up the car, whatever day you picked up the car, that is when you saw the engine in Croton Falls? [115]

A Right.

Q Is there any way you can find the name of the man who owned that car? Do you know where he lives?

MR. STIX: What man?

Q The man in Croton Falls.

A The junkyard owner?

Q No, the man in Croton Falls. You said that was a private owner, as I understand it.

A No, no, Croton Falls junkyard.

Q All right, you say the car engine was still in the car?

A Still in the car, and the miles were still on it.

Q The price was $250?

A $250.

Q This then was on or about May 9 or 10?

A The day before I picked up the car, right.

Q You picked up the car then on the 10th of May; is that correct?

A If that's what the receipt reads.

Q Well, I show you this check, Plaintiff's Exhibit 1, for identification, and ask you if that refreshes your recollection as to the date that you picked up the car? [116]

A Then I must have seen the engine on the 9th.

Q As I understand it, and you correct me if I am wrong, on April 15 you got this bill, did you, for the $431.34?

A Yes.

Q At that time, you then knew about the cost of the engine?

A Right.

Q Is that correct?

A Well, if I got the bill, I knew the cost of the engine, right.

Q When this bill was presented, namely Plaintiff's Exhibit 10, what did you say to whoever presented it to you?

A Well, first the service manager said, "Jeff, there is your car over there." He pointed over to the corner where it was boxed in by another twenty cars, so I couldn't get it out and test drive it. He said, "Would you take a look at the engine."

Q What date was this? [117]

A The day I picked the car up.

Q I'm not talking about — I am talking about the date this bill was presented to you, which you told me, or I understand you to say, was about April 15.

A The day I picked the car up he gave me the bill.

Q That is the first time you knew anything about the charges?

A What charges?

Q The $431.34?

A Yes. I never authorized the man to do anything. He handed me a bill for an engine that I didn't ask him to put in the car.

Q You called him a few days after the car was taken in, did you not?

A Sure.

Q You asked him what the problem was?

A Right.

Q You had a conversation then about replacing the engine?

A Right.

Q You said, "You look and I will look, and —" [118]

A Whoever comes up with the best engine at the best price, that is the one we are going to go with. I came up with the better price than he did, evidently, because I turned down that engine for $100, and I found a very nice engine for $250, but it was too late to put the engine in, because he already put his own in without any authorization. Am I making myself clear?

Q I will ask the questions.

A Fine.

MR. STIX: Let him ask the questions.

Q If you would listen to the question, and if you don't understand it, say so, don't volunteer.

A Okay, fine.

Q We will move much faster.

A Okay, fine.

Q Were you present on May 10, 1977, when the car was picked up?

A Yes, I was. I picked it up with my wife.

Q Did you look at this bill at the time it was picked up?

A Yes, I did.

Q Who were you dealing with there at Bano Buick at the time? [119]

A I was dealing with the service manager and the mechanic that we used to be familiar with, who was dodging me. In other words, I couldn't —

Q I just asked you who you were dealing with.

A I was dealing with the two of them, but I could only talk to the one.

Q Who did you talk to?

A I talked to the manager, the service manager.

Q What did you say to him and what did he say to you?

A Okay. As I said, he said I could examine the car, and I went over and lifted the hood. Everything looked extremely old and familiar, as I said. I asked him a very simple question. It's a '73 car, and I thought a substantial amount was paid for an engine. I asked him what year is the engine. He told me, "I don't know." I said, "Well, then, who picked up the engine?" He said, "Well, one of the relatives of Mr. Martabano, who is on his way back to North Carolina, to college, and he is unavailable." [120] I said, "What junkyard was it picked up at, maybe we could find out the year of the engine from the junkyard." Once again, he said, "We don't know." I said, 'Well, who was the mechanic who put the engine in." He said, "Ken Bradco." I said, "Ken, what year its the engine?" He said, "I don't know," so no one could tell me what year the engine was they put in the car, but yet they knew how much to charge for it.

Q You did have a conversation with Ken Bradco?

A I tried to, but he burried his head in the hood and wouldn't talk to me. This is a man I knew for years.

Q You asked him and he said he didn't know anything?

A "I don't know," that was the conversation.

Q Did this service manager say anything else?

A Yes.

Q In connection with this?

A Yes, he did. At that point, he started to get quite nasty. My wife was –

Q Tell us what he said, sir. [121]

A Okay, what he said was this; "You can take it or leave it. If you don't want that engine, Mr. Conway, we will gladly take it out for you, but you are going to be charged for the time it was here, you are going to be charged for us taking it out, and you are going to be charged for putting in the next engine," so at that point, we decided to take the cheapest way out and hope the engine would run.

Q I didn't ask you that, did I. I just asked you what he said, isn't that right?

A Okay.

MR. STIX: I am going to object to you badgering the witness. If he says something you don't like, just move to strike it.

MR. HENSON: Don't tell me how to run the examination, Mr. Stix, I have been around a little longer than you. If you trained your witness, maybe we would move faster.

MR. STIX: I don't have to train my witness. [122]

MR. HENSON: You know, he is supposed to listen to the questions, isn't he. You gave him that instruction?

MR. STIX: Yes.

MR. HENSON: If he didn't understand the question, he was supposed to say so, not –

MR. STIX: If he volunteers an answer, why don't you just move to strike it.

MR. HENSON: I don't choose to do that.

MR. STIX: Okay, that's fine, then I guess it stands in the record.

MR. HENSON: Are you trying to be cute?

MR. STIX: No, I am not. If it is not stricken, it will stand.

MR. HENSON: Don't tell me how to run an examination then.

MR. STIX: I am just asking for a clarification.

MR. HENSON: Did you instruct this witness on how to answer? [123]

MR. STIX: I said if he didn't understand the question, he should say so.

MR. HENSON: Did you tell him to volunteer and try to get in everything he could?

MR. STIX: Did I say that to you?

THE WITNESS: No, you did not, and I apologize, sir.

Q (Continuing) What kind of a car was this that you saw over at the Croton Falls junkyard?

A A 73 Opel Manta

Q As soon as you saw it, did you call them up and tell them?

A No, I visited the junkyard, because there are very – do you want me to continue?

Q Yes.

A There are very few of those engines around, because of the make of the car, so I called all I could. Some junkyards don't answer. I live in North Salem, and –

Q Did you call them up as soon as you found it?

A No, I called them up and nobody answered, so I went down there. You see, a lot of times they are out in the field. [124]

Q What day was it that you went down there?

A I really don't know the exact date. Like I said, I am in real estate, and I am driving right by Croton Falls. I pulled in. He had the car over there, so I looked at it.

Q As I understand it, you saw this engine at Croton Falls on May 9; isn't that correct?

A I saw the engine in Croton Falls on May 9?

Q Yes.

A No, I don't know what date it was.

Q When did you see that engine?

A I don't know the date I saw the engine.

Q Didn't you tell us that you saw that engine the day before you went to pick up the car?

A Right. Right, the 9th, right.

Q Did you call him on May 9 to tell him that you had another engine?

A I called him the day I picked up the engine. After I called him, I went right down and picked the car up, because he informed me that he already put one in. [125]

Q Were there any other conversations with the service manager and Mr. Bradco that you have not told us about, and if so, please tell us.

A On what occasion?

Q On the date you picked up the car.

A Well, I thought I covered most of it. They intimidated us.

Q Don't tell us what they did, just the conversation.

A He insisted upon being paid or, "Leave the car and we are charging you."

Q You told us that before, didn't you?

A That's all I can remember at this time.

Q Do you have something that is going to help you remember, something a little later on, about the conversations?

A Well, possibly, because I am a human being, and a lot of times you forget something.

Q What do you have, any records or something, that is going to refresh your recollection?

A Well, I didn't bring a tape recorder with me, but mentally something might come back. I said at this time I don't remember. I am not trying to be a wiseguy, I am trying to give you clear answers for your clear questions. [126]

Q Were you there at the time the check was delivered for this car?

A Was I there at the time my wife wrote the check to the service manager?

Q Yes.

A I instructed her to write the check to the service manager, under duress.

Q Did you tell the service manager you were writing the check under duress?

A No, I just wanted to get my car and hope that it ran, that's all. That's all I was looking for.

Q Did you tell anybody there, except your wife, that you were writing the check under duress?

A I did not tell my wife that, and I did not – under duress, I felt pressured, I wanted my car out of there, that's all. I wrote the check in good faith, hoping the car would run good. It didn't look like it would, but you never know.

Q Do you remember the question?

A Please repeat it?

MR. HENSON: Read back the question. [127]

(At this time, the last question was read back by the reporter.)

A I didn't tell anyone, I felt it.

Q You didn't tell your wife?

A No, I just felt I was being pushed around and threatened, and I would like to get my car home and hope it ran.

Q Was there any discussion about taking the car without writing the check?

A You mean he was going to give me the car for free?

Q You don't understand the question?

A No, I don't understand the question.

Q Was there any conversation about your taking the car without giving him a check?

A Between who?

Q You and anybody there at Bano Buick.

A You mean robbing my own car? I have to pay for the work. I don't understand what you are saying. Why would anyone give me the car for free when they did work on it?

Q You knew you had to give a check then, is that correct? [128]

A Of course.

Q Did you talk to anybody else at Bano Buick that day about this situation, other than the service manager and Mr. Bradco?

A No, there was no one else there.

Q Did you watch your wife write this check out?

A I didn't stand over her, but I thought –

Q Did you look at the check before it was delivered?

A No, she is a capable woman of writing a check.

Q You didn't look at it?

A Why would I look at it?

Q It's a very simple question.

A Did I look at the check after my wife wrote it?

MR. STIX: Yes or no.

A No, I did not look at the check after my wife wrote it. My wife writes checks in good faith, as –

Q Why don't you just answer the question. These are simple questions. [129]

MR. STIX: Yes or no.

A No.

Q Did you ever get any kind of a piece of paper from Croton Falls, as to this engine?

A No.

Q You don't know the name of the man with whom you spoke over there?

A No.

Q Did you ask him to save the engine for you, that you wanted it?

A I told him that possibly I would be back that day, that is why I called Bano and told them that I had found the engine, would they pick it up for me or should he deliver it.

Q But that telephone call didn't originate until May 10; isn't that correct?

A No, no, the day I found the engine, I called up Bano.

Q You didn't talk to anybody, did you?

A The service manager.

Q You did?

A Yes.

Q You told him you had found the engine? [130]

A Right.

Q He said, "No, I have already put one in."

A Right.

Q After May 10, did you have a conversation with anybody else at Bano concerning this matter of the engine?

A After May 10?

Q Yes, after May 10.

A After May 10, after many phone calls, or a few phone calls from Mr. Martabano, I went down to visit Mr. Martabano.

Q What date, sir?

A I don't recall the exact date, I'm sorry.

Q The answer is you did have some other conversations?

A Yes, I did.

Q You don't recall the dates?

A Not conversations, conversation, one conversation with Mr. Fred Martabano in his office. I asked him about –

Q I didn't ask you that.—

A I'm sorry, go ahead.

Q Would this have been after your wife, or somebody at your house, received a call from Mr. Martabano saying that the check had bounced? [131]

A This was after that phone call, yes.

Q Who did you see at Bano Buick at this time, when you went down and had the conversation in his office?

A I saw Mr. Fred Martabano in his own showroom, when he —

MR. STIX: He just asked you who you saw.

THE WITNESS: Yes.

Q Is that the man seated here?

A Yes, it is.

Q What did you say to him and what did he say to you?

A Well, we discussed the engine, and he said, "What's the matter with the engine, Mr. Conway?" I said, "Mr. Martabano, it's an old engine from Bedford Auto, and I turned it down for $100, number one, and you are charging me $200, but that's your business." He said it was a good engine. At any rate, I said, "How do you know it came from there?" He said, "We called around and looked around." He got on the phone and called a fellow up. He said it was his nephew that owned the place, and on the phone he said, "Is it a good engine?" And then he related to me, he said he said it's a good engine, then he said, "Did it have low mileage on it when you took it out of the car?" He said it had low mileage on it when he took it out of the car. He said, "It's a real good engine," and he said, "Real good engine," and that's the satisfaction I got from Mr. Martabano when I went down to visit him. [132]

Q What did you say then when he said that to you?

A There's not much I could say.

Q I didn't ask what you could say, I asked you what you said.

A I didn't ask for the engine, I didn't want the engine.

Q I asked you what you said.

MR. STIX: That's what he's telling you.

A After the man talked to me like that, I shook Mr. Martabano's hand and left.

Q Please. [133]

A I said nothing.

Q You said nothing?

A There was nothing more to say. I was talking to a stone.

MR. STIX: Off the record.

(Discussion off the record.)

Q Did you tell him that you didn't want the engine at that time?

A Yes, I did.

Q What did he say, sir?

A He said that for an additional charge, he could do it all over again.

Q Did he tell you how much?

A He didn't know. He didn't come up with any specific amounts.

Q Did he tell you he would replace that engine?

A He said he would put the engine of my choice in for an additional charge, but did not know when he could get to it.

Q But there is no doubt in your mind he wanted you to pay not only for the bill of April 15, Plaintiff's Exhibit 10, but also he wanted you to pay for the charge for putting the other one in? [134

A And with no time limit of when it would be completed, knowing I needed my car.

Q He didn't volunteer to put it in at no charge?

A No, he did not, anything but. To the contrary, sir. I asked for a price reduction, and –

Q Was he willing to take off the $200 for the other engine?

A He made me no cash offer of that.

Q I didn't ask you that.

A No, he did not. He certainly did not.

Q Did you discuss the matter of the other engine that had already gone in?

A Yes, we did.

Q What was that? Did he want you to still pay for that engine?

A Yes, he did, then as I said – do you want me to continue? He made the phone call.

Q No, you don't have to.

A Okay.

Q So that I understand you to say that he wanted you to pay for the two engines and two installations; is that correct? [135]

A That is correct. Actually two installations and one taken out again, so he would have to put in one – no, take out two and put in two.

Q Didn't you tell me also that he wanted you to pay not only for the engine that you were going to have of your choice, but also he wanted you to pay for the engine that was already in there?

A Of course. Yes, I did.

Q After this check was delivered, payment was stopped; is that correct?

A That is correct.

Q Did you do that or did you give that direction, or did your wife give it to the bank?

A My wife wrote the check, so I instructed my wife, after driving the car home and finding the engine to by faulty, after my next-door neighbor examined –

MR. STIX: Just answer the question.

Q Now, sir –

A I am explaining my answer.

Q I didn't ask for any explanation, did I?

A Okay, what did you ask? [136]

Q You are an intelligent man, what are you trying to do with this record?

A Not a thing, I am trying to clarify it.

Q You are trying to be a wiseguy.

MR. STIX: I object to your badgering the witness. Just answer the questions. Read back the question.

MR. HENSON: Why don't you take control of your client?

MR. STIX: Would you read back the question, please?

(At this time, said question was read back by the reporter.)

THE WITNESS: I told my wife to call the bank.

Q When did you instruct your wife to stop payment?

A After the inspection of the car.

Q When was that, sir?

A That was that same evening.

Q Did you drive the car home, sir?

A Yes, I did.

Q Did you stop any place on the way? [137]

A No, I was afraid to stop.

Q I didn't ask you that.

A No, I did not stop, sir.

Q After you got home, did you call up Bano Buick and make a complaint about the condition of the engine?

A Not at that time, sir.

Q What did you notice was wrong with the car on the way home?

A The car was misfiring, bucking. The alternator light was on. My new alternator was taken out and an old one was in there. The carborator was all full of junk.

Q Did you look at the carborator that day?

A I looked at it that evening with a neighbor of mine who is an ace mechanic. He took the whole thing apart. The plugs were frozen.

Q You took the carborator apart that evening?

A My neighbor. This is why I didn't call Bano until the next day. It was my neighbor.

Q Your neighbor took the carborator apart?

A He just overlooked the engine. He said the wires – he said, "This is junkyard engine." He said, "The wires are totally burned, you need new wires, you need a new carborator, you need a new alternator." [138]

Q What is the name of your neighbor?

A That was a Mr. John Habich.

Q Spell that, sir.

A H-A-B-I-C-H.

Q Is he still living there next to you?

A Yes, he is.

Q Where does he work?

A I believe he is away at school.

Q Does he go to college?

A I'm not sure.

Q How old is this man?

A Twenty, I guess.

Q Twenty?

A Yes.

Q So at the time, he was seventeen?

A Yes.

Q Did you say he was a master mechanic?

A Yes.

Q Where did he work? Where did he become a master [13
mechanic?

A With his father, in their garage.

Q Beg your pardon?

A With his father, in their garage.

Q Where is that garage?

A Right across the street from my house.

Q Is that a commercial garage or is it a private garage?

A No, it's his private garage.

Q Does he carry on a business there of any kind of repair-
ing automobiles for other people?

A No.

Q In other words, this master mechanic only works on the family cars then, as far as you know?

A It's a hobby, a father and son hobby.

Q When your car breaks down and you repair it, it's more than a hobby, isn't it?

A I really don't know how to decipher that question.

Q You used the word hobby. Where do you get the word hobby?

A Well, it's a father and son relationship, that they both enjoy rebuilding cars and –

Q Rebuilding cars? [140]

A His father is a fire chief, so there is a lot of time off, and he is home with his son. They take cars apart.

Q Have you watched them rebuild cars?

A He always likes to fiddle with cars, foreign, domestic, whatever.

Q Did you discuss the question of this engine with this young man, after this problem developed? Did you discuss the location of an engine with him, this master mechanic that you have just mentioned?

A I am not following the question. After I got the car did I what?

MR. HENSON: Withdrawn

Q After the car broke down on 684, you brought it into Bano Buick?

A Right.

Q In other words, you had a telephone conversation with Bano Buick, and they said the engine blew up and you needed another engine, isn't that correct?

A Yes.

Q Did you go and talk to your master mechanic friend across the street as to the location of another engine? [141]

A You mean my neighbor, John Habich?

Q Yes.

A I asked John in his travels, and his father, if they saw an engine, please let me know.

Q But nothing else developed out of that?

A No. There was one other mechanic involved.

Q Just a minute.

A Okay.

Q After you brought the car home after you gave the check to Bano on May 10th, did you have the car repaired?

A No, I did not.

Q You just left it stay at the house; is that correct?

A Yes, I did. That's when the other mechanic came.

Q Did you have anybody else look at the car?

A Yes.

Q A mechanic of any kind?

A Yes.

Q Who was that? [142]

A I will have to get his name for you, but I sold the car as it, that's–

Q My question is, right now, do you know the name of anybody else who looked at it?

A I will try to find out his name. Another fellow had brought him. He wasn't a friend of mine. I didn't call him.

Q Did you get a bill from that other mechanic?

A I didn't hire him, I sold it.

MR. STIX: Yes or no.

THE WITNESS: No.

Q Then eventually you sold the car as it was?

A I sold it as is, right.

Q What date did you sell it?

A I'd have to get that date for you.

Q Would that have been within a short time after May 10?

A It wasn't too short, no.

Q Give me some idea, sir.

A A month or two.

Q To whom did you sell it, sir? [143]

A Maybe longer than that. I sold it to Mr. Victor Licitar.

Q Victor–

A Licitar.

Q Spell that.

A L-I-C-I-T-A-R.

Q Where does he live, sir?

A I don't know where his residence is at this time.

Q Where did he live at the time that you sold it to him?

A He used to live in White Plains on North Broadway.

Q Do you have an association with him of any kind?

A I used to work for him as a roofer maybe fifteen years ago. He is the one who hired the mechanic.

Q What was the name of his business at the time you worked for him as a roofer?

A White Plains Roofing. What is that street they knocked down – Quarropas.

Q Quarropas?

A Is that the one they knocked down completely? It's right [14
off of Main Street.

MR. STIX: William Street?

THE WITNESS: No, there is Grove Street going towards –

MR. STIX: Lexington Avenue?

THE WITNESS: Between Lexington and Grove there is a little tiny street. They knocked the whole thing down.

Q Orawampum?

A It's right off Main Street. It's between Grove and Lexington, on Main, off of Main, a little street that they knocked down completely.

MR. STIX: William?

THE WITNESS: No, not William. They knocked it down maybe ten years ago. That is where the office was, then they moved to Mahopac, I think.

Q Did I understand you to say that Mr. Licitar hired this mechanic?

A Right. If I can find out where he is, I can find out the mechanic.

Q Was there any conversation with Bano Buick before this sale, about the bill?

A In regard – no, I don't believe so. In regard to the sale? [145]

Q Yes, in regard to the sale of the car to Mr. Licitar.

A I didn't call Bano Buick to tell them I sold the car to Mr. Licitar, no. It was months later. I had a receipt for the car. I can give you that.

Q Do you have that receipt with you?

A No, not with me.

Q You have possession of it?

A Yes, I could find it.

Q May we have a copy of it?

A Sure.

Q Do you remember how much money you got for the car?

A Yes, I do.

Q How much?

A I got $800 for the car as is.

Q You [illegible] member how much you paid for it, though, when you bought it from your mother-in-law?

A In the area of $2000, maybe a little more.

Q Prior to issuing or instructing your wife to stop payment on check number 154, Plaintiff's Exhibit 1 for identification, did you examine your bank statement to see how much money you had in the account? [14

MR. STIX: At this point, I'm going to object to this line of questioning, because there is a decision of Harold Wood, Justice of the Supreme Court, dated March 20, 1980, and entered March 21, 1980, which announces the law in this case regarding the question of the bank account. With that objection, go ahead and answer the question.

THE WITNESS: What was the question?

MR. HENSON: Read it back [At this time, the last question was read back by the reporter.]

A No, I did not.

Q Who keeps that checkbook, both of you or one of you?

A Basically, my wife.

Q Does she also make the deposits when they are made? [14

A Like all wives.

MR. STIX: Yes or no.

A Yes.

Q Defendant's Exhibit A for identification is a bank statement I believe as of May 20, 1977. Would you look at that, sir?

A Yes?

Q Is that the bank statement you received, sir, for the period indicated, or for whatever is shown there?

A It seems to be.

Q Do you know of your own knowledge when that statement was received?

A No, I don't.

Q Can you tell—

A Would that be that date?

MR. STIX: If you don't know, you don't know.

THE WITNESS: I don't know.

Q Now sir, on or about June 28, 1977, did your wife receive a phone call on that date?

A I really couldn't say.

Q You weren't home? [148]

A I really couldn't say. It's a little—in other words, it's so long ago, I don't know where or what I was doing.

Q Did she tell you at any time that she had received a phone call from Detective McKenzie in connection with a certain check?

A Yes, she did.

Q What date did she tell you that?

A Once again, the date is vague, but we did receive the phone call.

Q I believe she testified—

MR. HENSON: Correct me if I am in error, Mr. Stix—

Q I believe she testified it occurred on June 28?

A I would have to agree with that.

Q Do you recall that she told you the same day?

A Yes, I do.

Q Where were you when she told you?

A That Detective McKenzie had just called?

Q Yes.

A In bed. [14

Q Did you do anything that evening about it?

A I got quite upset.

Q I didn't ask you that.

A That's what I did. You asked me what I did, I got quite upset.

Q I'm asking you, did you call anybody?

A No, I did not.

Q What time was it when your wife told you about this?

A 11:05. I was sitting right next to her.

Q Did you hear her conversation?

A I didn't share the phone with her. She talked on the phone. When she hung the phone up, she told me what had occurred.

Q Did you hear her say anything on the phone?

A To Detective McKenzie?

Q Yes.

A Nothing specific that I can recall.

Q Did you –

A He did all the talking, I think.

Q You didn't hear him talking, though, did you?

A No, but my wife wasn't talking, and evidently he was. [150]

Q You didn't hear her say anything to him that you can recall?

A Not that I can recall.

Q The next day, did you do anything about this, about this call, or the check?

A No, I didn't personally.

Q Did you give your wife any instructions?

A I never do.

Q You instructed her to stop payment on the check, didn't you?

A I suggested, not instructed.

Q Did you have a conversation with your wife concerning calling him back, calling Detective McKenzie back on the next day, on the 29th of June?

A We had a conversation regarding the Detective's phone call, as far as it being quite out of order, and reminding us of gestapo tactics such as the Nazis used in the thirties, and this is America, and these things didn't –

Q Do you want to make a speech, sir?

A I just explained it.

Q I didn't ask you what the conversations were, I asked you did you have a conversation? [151]

A Yes.

Q Isn't that correct?

A A lengthy conversation.

Q The answer is a simple yes, isn't it?

A Okay, yes, we did.

Q Were you present at the time she called Detective McKenzie back on June 29 as she related?

A I believe I was.

Q What did she say?

A That under our constitutional rights as we know them –

Q I'm asking you, sir, what she said, not what your interpretation is. Do you recall her conversation?

A Well, in that case, no.

Q On June 30, did you hear her have any further conversations with a man reported to be Detective McKenzie?

A At this time, I can't recall.

Q Did you communicate with Bano Buick, or anybody there, after the June 28th or the 29th or the 30th, any of those three days? [15

A Now I don't understand the question.

MR. HENSON: Withdrawn.

Q After the phone call on June 28 from Detective McKenzie.

A Yes?

Q Did you communicate with Bano Buick within the next few days, concerning this matter?

A As I recall, after that incident, I went down personally to talk to Mr.–no, I–

Q Within a few days afterwards?

A Within a few days after?

Q Yes.

A At this time, I don't recall.

Q You have told us, have you not, sir, about going down and having a conversation with Mr. Martabano down at his office?

A Yes, I did.

Q Between that conversation and June 28th, did you communicate with him?

A With Mr. Martabano?

Q About this matter?

A With Mr. Martabano?

Q Yes. [153]

A Nothing comes to mind at this time.

Q Do you know Mr. Shane at the bank?

A Not personally.

Q Do you have more than one account at the bank?

A All banking is done by my wife.

Q Don't you know how many bank accounts you have at that bank?

A Actually, I really don't. My wife takes care of everything.

Q Were you present at the time Mr. Shane delivered a letter to your wife from the bank marked Defendant's Exhibit B for identification?

A So I understand the question, did I see the letter, or was I present when it was delivered?

MR. STIX: Were you at the bank when she got the letter?

THE WITNESS: No, I was not.

Q Now sir, on June 30, were you at home when Detective McKenzie came to your home?

A To arrest my wife?

Q Sir, I am –

A I am trying to recollect. [15

Q Sir, do you recall on June 30 an Officer coming to your house whom you later learned to be Detective McKenzie?

A Yes.

Q Was there another man with him?

A Another detective was with him.

Q Were they driving a car?

A Yes, they were.

Q Where were you when they arrived?

A I was in my driveway, washing my car.

Q What did one or both of them say to you?

A From the street, they yelled out, "Are you Conway." I said, "Yes, why?" They said, "We are the Mount Kisco Police. We are here to arrest your wife," in front of my neighborhood.

Q Did they then pull in the driveway?

A After they made that announcement, they pulled in my driveway.

Q Then what conversation took place?

A I asked them to identify themselves. The one, Detective McKenzie showed me his identification. The other detective showed me nothing.

Q Did you ask him again? [155]

A No, I did not. I was a little upset at the fact that –

Q I didn't ask you that.

A I'm sorry. No, I did not.

Q Where was your wife at this time?

A My wife was watching all this going on with my neighbor on the side yard.

Q She was in your neighbor's yard, was she?

A All the yards connect. She was on the side of the house, right.

Q Then what did you say?

A I called my wife over and explained to her what was explained to me by Detective McKenzie.

Q What did Detective McKenzie say to you? What did he explain to you?

A That was wife was -- he was here to arrest my wife on a bad check charge to Bano Puick, and we showed him the letter which in fact Mr. Shane gave us that it was not a bad check. We thought out of innocence that would be okay, he could take a letter and not my wife.

Q You showed him that letter?

A Yes. [156

Q Did you have the letter or did your wife?

A My wife went in and got it.

Q She went in and got it?

A Yes.

Q She brought it out?

A Yes.

Q Then what did Detective McKenzie say?

A He said that it has no bearing, that he has his job to do, and I asked if I could bring my wife down. One of the detectives said, "It would be okay with me, how about you?" Mr. McKenzie said definitely not, and I followed him down.

Q Your wife then went in the car with the two officers?

A First they handcuffed her. She was put in the car and driven out of our neighborhood rather embarrassingly.

Q I didn't ask you that.

A I know, it just fell out.

Q You followed them to the police station, did you?

A I followed the two Mount Kisco detectives to the police station, with my wife in their car. [157

Q They didn't stop any place along the line, did they?

A No.

Q What time did they arrive at the police station?

A It couldn't have been after eight o'clock because it only take twenty minutes.

Q What time did they arrive at your home?

Q 7:20, 7:30.

Q Did you look at your watch?

A I was washing my car. I was aware of the time.

Q They entered the police station, did they?

A They did.

Q Did you go along?

A I did.

Q Through the side door or the front door?

A Side door. We all parked in the rear in the parking lot.

Q Then did you go before the police sergeant at the desk?

A I met my wife at the desk. They were ahead of me. [158

Q What did the police sergeant say?

A I wasn't in on the entire conversation. I did hear him say that bail was five hundred dollars, because I tried to call a couple of bail bondsmen.

Q I just asked you what he said.

A I'm sorry.

Q Did you wife say anything at that time, so far as you recall?

A She was crying more than talking, so she really didn't say anything that I can recall at this time.

Q Did the sergeant say anything about a bad check charge?

A As I said, I wasn't – I came in later on in the conversation. I just heard the bail and I heard that the judge who was in charge was in court.

Q Then did the police matron come in or appear?

A I believe she was there all the time. At least when I showed up, she was there.

Q Didn't you arrive substantially at the same time at the [159
police sergeant's desk as your wife?

A Within a few minutes, yes. You asked me if she was waiting there when she came in.

Q The police matron, was that a lady by the name of Heath?

A I really didn't get her name.

Q Did there come a time when the judge appeared, or you saw the judge?

A We saw the judge at one-thirty, about one-thirty that evening.

Q One-thirty the next morning?

A Yes.

Q That was Judge Bender?

A Yes.

Q What did the judge say to your wife, if you heard?

A I was right there, I heard. He looked at the charges, he looked at the letter as well. He apologized for keeping us waiting, and he thought the whole thing was a little ridiculous to keep us all waiting all night.

Q He said this?

A Yes, and he apologized. He said, "I'm very sorry. If someone made me aware of this, I would have let you go earlier."

Q That's what the judge said?

A Yes.

Q Was anybody else present at that time except you, your wife, the judge and the matron?

A I really don't recall at this time if there was anybody else. It was pretty late.

Q Then I gather you went home?

A Yes.

Q What car were you driving?

A What car was I driving?

Q You don't recall?

A It's only a few years now. We have beep hung up quite a long time. I don't remember, I'm sorry.

Q You weren't driving the Opel, were you?

A No, that was undriveable. That was dead in the driveway.

Q You only had one other car, isn't that right?

A At that time, I either got rid of the — I had an old Volskwagon, and we bought a secondhand Oldsmobile in that same time period. I think I had the Oldsmobile. As I stated before, I wasn't sure of whether it was a Volkswagon or the Oldsmobile. This is many years ago. This wasn't exactly two weeks ago. [161]

Q Who was the family doctor?

A Who was my family doctor?

Q Your wife's family doctor, Walter Sonnenborn?

A Sonnenborn, right.

Q Did she go to the hospital for anything connected with this incident?

A She works in the hospital. Did she go to White Plains Hospital for —

Q She works in a doctor's office.

A She works in a psychiatric service. It's a day hospital, whatnot.

Q You know that's a State Hospital. Do you call that a hospital?

A Yes, I call that quite a hospital, for people who need psychiatric help. It's a psychiatric hospital.

Q Have you been in it, sir?

A Have I been in it?

Q Yes. [162]

A I visited it many times.

Q That is located right across the street from the White Plains Hospital, isn't it?

A Yes, which I hope I never have to die in.

MR. STIX: Just answer the questions.

THE WITNESS: What a hospital.

MR. STIX: Just answer the question.

Q After this incident, did your wife stay at home from work for a certain length of time?

A Yes, she did.

Q How long?

A Off and on, a considerable amount of time. I did not count the days.

Q What is a considerable amount of time, sir?

A Over the years, I'd say it ran into quite a few months, because it ran into quite a few years.

Q Did you consult a doctor after this incident?

A An M.D.?

Q Any kind of doctor, sir?

A A psychiatrist.

Q Isn't that an M.D., sir?

A Yes, I did. [163]

Q How often did you see him, sir? We saw him sporadically on and off for a few months, to try to straighten a few of these problems and insecurities out that have been caused by this case.

Q Did I ask you what the nature of it was? I asked you how often you saw him.

A I am very sorry, you did.

Q I don't think you are at all.

A In reality, I guess I am not. We have been put through quite a bit.

MR. STIX: Just answer the questions.

Q You did receive psychiatric treatment are you telling me?

A Myself?

Q Yes.

A Yes, I did.

Q Who gave it to you?

A A friend of mine is an analyst, Mr. Al Vent.

Q Al Vent?

A Yes.

Q Where is his office, sir?

A His office is on Post Road. [164]

Q Is that in the same office with Dr. Yapalater?

A The exact same office.

Q What dates did you go to see him, sir?

A Whenever I was available, or I felt the need.

Q I didn't ask you when you were available, I asked you when you went to see him. If you don't know, kindly so indicate.

A Fine, then I cannot answer that question, because I don't have the dates available with me.

Q Did you get a bill for these services, sir?

A Yes, I did.

Q Do you have that bill?

A I might have that bill.

Q Did you pay the bill, sir?

Q Well, of course, I pay all my wife's bills.

Q How much was the bill?

A I can't recall at this time.

Q Was it more than one hundred dollars?

A I really can't honestly recall how much the bill was. Number one, he is a personal friend of mine. [165]

MR. STIX: No, no, just answer the question.

THE WITNESS: That is why I cannot recall –

MR. STIX: He doesn't care why you can't.

THE WITNESS: Okay.

Q Would you look for the bill, sir?

A Yes, I will.

Q Did you ever consult any psychiatrist prior to this accident?

A No, I did not.

Q Or prior to this incident?

A No, I did not.

Q Did you have a family doctor prior to this incident?

A I had no family doctor, no. Oh, yes, I'm sorry, Dr. Halko out of Mount Kisco.

Q H-A-L-C-O?

A K-O.

Q H-A-L-K-O?

A Yes, Northern Westchester Hospital.

Q These treatments by Dr. Vent, that would be over what [16
period of time, would you say?

A On and off, under a year, at any rate.

Q How often would you go, sir, approximately?

A Very sporadic. Maybe once a week or once every two weeks.

Q Did you pay him by check, do you think?

A No, I don't think so. As I tried to explain before, he is a personal friend.

Q Just a minute, you did get a bill?

Q Yes, I think I did.

A I thought you said that you paid that bill?

A I did, and more than likely, in cash.

Q Did you pay it in cash or by check?

A I would say cash.

Q Has Dr. Vent been on the staff down there of Dr. Yapalater for a period of time, sir?

A I would say so.

Q Did he represent to you that he was a psychiatrist?

A He is a social worker.

Q He is not a medical doctor then?

A No, he is a social worker. [167]

Q But didn't you tell me before that you received treatment from a psychiatrist, an M.D., by the name of Dr. Al Vent? Didn't you tell me that before?

A No, no, no. If that's the way you interpreted it, I'm sorry. He is a social worker.

Q He was rendering psychiatric treatment for which you received a bill; is that correct?

A More personal than psychiatric, as I tried to –

Q What did you tell him your problems were?

A I believe that's personal.

MR. STIX: I object to the question.

A That's between me and my doctor, I'm afraid.

MR. STIX: You can answer the question. You have to answer the question.

A Well, we have had marital problems caused by the incident over at Bano Buick.

Q What was the nature of those problems?

A The nature of those problems are security. Mentally I was quite disturbed. We moved into North Salem for security, [168] and with the police coming and dragging my wife out of my house, it made us feel very insecure, someone knocks at your door, what do you think next; another policeman from Mount Kisco might be there taking someone else away. It made us feel more than insecure, more than unhappy; mentally, physically and sexually. I hope I don't have to make it any clearer, but it has been a nightmare.

Q You explained all this to Dr. Vent?

A Not Dr. Vent, social worker Vent.

Q Didn't you tell me Dr. Al Vent — that was the man you went to?

A My error. I think of him as a doctor, and that is my mistake, because I mean I met doctors that couldn't touch his coattails. The man is a very well qualified social worker. He has been most helpful to me and my wife.

Q You explained to this social worker all of your problems?

A That's right.

Q That included your marital problems?

A That's right.

Q The marital problems, including a sense of security? [169]

A That's right.

Q Arguments?

A Of course.

Q Sex problems?

A Of course, all created after the incident.

Q Did you mention each of these things to him on each visit you had with him, Dr. Vent, with Dr. Vent?

A I really can't recall how our visits went, or what was discussed. I tried to generalize exactly what we went through together.

Q When you had these consultations with Dr. Vent, was your wife present?

A Occasionally.

Q These arguments with your wife, did they involve this check and all the events around Bano Buick?

A Not at all, it more involved insecurities.

Q I am just asking you about that, sir.

A No sir.

Q The anwer is no?

A No sir.

Q Did it involve finances, sir, at any time? [170]

A No sir, it did not.

Q Was this your first marriage?

A No sir, this is my second marriage.

Q Has your wife been married before?

A No, she has not.

Q You never did see Dr. Yapalater about this, did you?

A I have spoken to him on occasion.

Q Did you consult him as a psychiatrist in connection with this problem?

A No, more as a personal friend.

Q Did you explain all of these problems to him that you explained to Dr. Vent?

A Not Dr. Vent, social worker Vent. He seemed to be working everything out to my satisfaction. There was no need to call Dr. Yapalater. If I saw him at a social function, we discussed the situation, yes.

Q Were you ever present when your wife consulted Dr. Yapalater?

A No, I was not, but I can recall at this time — [171]

Q The answer is very simple.

A No, I was not.

Q When this matter came on in the Village of Mount Kisco before the court, were you present on all occasions when the case was before the court?

A Yes, I was.

Q How many times did you appear?

A I believe that's a matter of record. I don't have any —

MR. STIX: You don't remember?

THE WITNESS: No, I don't remember.

Q Do you know whether it was on the calendar and you did not appear?

A No, I do not. I don't recall.

Q You turned this over to your attorney, did you? You just took instructions from him on appearances?)

A My attorney handled everything. Whatever he tells me to do, I would do, of course.

Q Did you have a discussion at any time concerning a settlement of this matter?

A This is what we tried to do all along, yes. [172]

Q Who did you have those settlement discussions with?

A My wife, my lawyer. I talked to Fred Martabano. That's why I went down to talk with him in the first place, to try to get this settled.

Q At the time you saw him in his office, did you discuss a settlement of this?

A I tried to.

Q What were those settlement discussions?

Q I explained my end, that we did in fact have the car repaired three months before and three months later it blows up.

Q As you have already explained.

A Right. Where would you like me to pick up?

Q I want to talk about the settlement.

A We already discussed this, and I don't want to get you mad. It's a repeat of what I have already said.

Q I'm asking what the settlement discussions were.

A The settlement discussion went as far as Mr. Martabano getting the phone and — [173]

MR. MATLIN: Off the record.

(Discussion off the record.)

Q When we talk about settlement, I am referring to an agreement or understanding whereby it would be some arrangement made between the parties concerning payment of all or part of the bill, and a discontinuance of the proceedings against Mrs. Conway. Did you have any conversations with Mr. Martabano about that, at that time?

A At the time I visited him at his office?

Q Yes.

A No.

Q Thereafter, did you have a conversation with your attorney, and/or your wife, about such a settlement of the whole matter?

A At the same time period, or —

Q Well, at any time after that.

A I believe we did.

Q Would that settlement include a discontinuance of the action in court against your wife, and the payment of a bill; of the bill?

A I remember she was more than upset at the thought of going to jail, I think. [174]

Q If you don't recall, just tell us.

A I do recall that, something to that effect.

Q Was that discussion with your attorney?

A We discussed trying to, you know, straighten this thing out any way and every way we could, but got no satisfaction. At this time, I was financially in the hole.

Q You mean at the time of the settlement discussion?

A Well, when I say financially in the hole, because of the engine, the car was devaluated, it wouldn't run, and I couldn't sell it.

MR. HENSON: Off the record.

(Discussion off the record.)

MR. HENSON: Would you mark this for identification as Defendant's Exhibit I.

(At this time, said document is marked for identification as Defendant's Exhibit I.)

Q I show you Defendant's Exhibit I for identification and ask you if you ever saw that?

A Yes, I did. I saw this. [175]

Q Was that substantially the same agreement that you discussed with your lawyer as to the settlement of this matter?

A I believe so, at that time.

Q This settlement was not consumated, or not finished then; is that correct?

A No, it was not.

Q Did you offer to pay the money involved here?

A For the broken engine?

Q The money that is mentioned in this Defendant's Exhibit I for identification?

A Did I offer to pay Mr. Martabano — I don't understand the question, I'm sorry.

Q There is $431.34 mentioned in this Defendant's Exhibit I for identification?

A Right.

Q Did you offer to pay that?

A We considered dropping all charges to just settle this whole matter, but after further conversation, what we were put through and what it cost us, we just could not do it. [176]

Q The answer then is that you didn't offer to pay this $431, isn't that correct?

A That is correct.

Q Other than Dr. Vent or Dr. Yapalater, was there ever any other doctor involved in anything that came from this incident?

MR. STIX: I object to the form of the question. It's not Dr. Vent, he is a social worker. Is it Mr. or Dr.?

THE WITNESS: Mister.

MR. STIX: Mister?

THE WITNESS: Mister.

Q He doesn't have a doctorate of any kind then?

A I believe I made that perfectly clear a few moments ago.

Q Other than Mr. Vent and Dr. Yapalater, were there any other medical doctors involved here?

A Because of their expertise, there were no others needed.

MR. STIX: The answer is no.

Q The answer is no?

A That's no. [177]

Q Did you miss any work after this accident, or this incident?

A Yes, I did.

Q What dates did you miss from work?

A I don't have them off the top of my head, but being in real estate, you can imagine.

Q I can't imagine what your problems are.

A Psychologically speaking, there would be times — I do not have the dates available at this time.

Q Do you have a record at your office that would show the dates that you were not at work?

A Yes, I do. I have a complete log of every day of the year.

Q Would you please furnish us with copies of those work logs?

A Certainly,

Q For the period in which it is claimed that you did not appear for work?

A Yes.

Q You were never confined to bed, were you?

A No, I was not.

Q Were you paid for the days that you were not able to appear for work?

A I am only paid for what I create, so needless to say, I was not.

Q That is you work on a straight commission?

A Strictly straight commission, that's correct.

MR. HENSON: Is there a claim here for loss of income, Mr. Stix?

MR. STIX: I don't think so.

MR. HENSON: I have no further questions.

EXAMINATION BY

MR. MATLIN:

Q Mr. Conway, the time that you picked up the car from Bano Buick, I believe you stated it was located in the corner area?

A Yes.

Q It was blocked in at that time?

A That's correct.

Q Did there come a time when the car was moved out of that corner area?

A Yes, at that time it did come about.

Q Did you move it out of that corner? [179]

A Yes, I did.

Q You had occasion at that time to start the engine?

A I started the engine, that's correct.

Q When you started the engine, did the alternator or generator light go on?

A Not immediately.

Q Did the car appear to be firing on all four cylinders?

A Very roughly.

Q Did you make any statement to the mechanic or the service manager regarding the manner in which the engine was firing?

A Yes, I did.

Q What did you say to him and what did he say to you?

A Well, that was the whole basis of asking him what year the engine was, because it was so old and corroded, he could not answer me that question. He just wanted a check to release the car. I gave him the check and he released the car.

Q Did you have occasion, before starting the engine, to raise the hood? [180]

A Yes, I did.

Q Did you look at the engine?

A Yes, I did.

Q This was a four cylinder engine?

A Yes.

Q Did you observe whether or not it had an air cleaner on top?

A Yes.

Q Did the air cleaner cover the top part of the engine, or was it to the side of the block?

A I'm not really clear on that, but it was quite visible what the engine was and where it came from.

Q What was visible?

A The condition of it compared with the engine that was in it.

Q Could you tell me –

A It was not a '73 engine, it was a '70. I think Mr. Martabano –

Q When you observed the engine, what did you observe about the condition, vis-a-vis cleanliness?

A Basically –

Q Was it clean or was it dirty? [181]

A Completely filthy and corroded.

Q Explain what you mean by corroded.

A The metal was pitted. I had a brand new alternator in my car. When you replace an engine, you replace your alternator, the carborator. They sell you a short block, not a junkyard carborator that has been sitting out in the rain for six months, rusty.

All my good parts were no longer around, and I got no credit for any of them.

Q Let me see if we can start piece by piece without going through the speech.

A Okay.

Q You said that you drove the automobile home?

A Yes.

Q You drove it straight home; is that correct?

A Yes.

Q When you got the car home, you asked Mr. John Habich to examine the engine?

A Just give me his opinion.

Q You asked him to examine the engine? [182]

A Give me his opinion.

Q Did you raise the hood or did he raise the hood?

A I raised the hood. I was looking at it.

Q I just asked you who raised the hood.

A I did.

Q He observed the engine with his two eyes?

A He did that.

Q Did he test the timing of the engine?

A No, he did not.

Q Did he test the compression of the engine?

A No, he did not.

Q Did he test whether or not the firing order of the engine was in correct sequence?

A No, he didn't.

Q Did he remove the valve cover?

A No, he didn't.

Q Did he remove the sparkplug wires?

A They could not be removed.

Q The wires could not be removed?

A The wires fell apart.

Q I'm just asking you whether or not they could be removed. [183]

A They could.

Q They could be removed?

A Yes.

Q Did he remove them?

A No, I did.

Q Yes.

A Did he or you remove any of the sparkplugs?

A We tried.

Q Did you remove any of them?

A I couldn't.

Q You attempted to?

A I attempted to, and I couldn't.

Q They could not be removed?

A No.

Q Did Mr. Habich, after observing the engine visually, and doing whatever he did, render to you an opinion regarding the engine? Now I'm not asking you what the opinion was, I want to know if he rendered an opinion.

A Yes, he did.

Q Did he, as part of his opinion, indicate to you what the cost might be to rectify whatever problem he thought there was? [184]

A No, he did not.

Q Did he indicate to you whether or not the engine was or was not capable of running correctly?

A No, he did not.

Q Did he indicate to you what things had to be done in order to –

Q No, he did not.

Q I didn't finish the question. Did he indicate to you what things had to be done, if anything, in order to make the engine run in a good and proper manner?

A No, he did not. A visual inspection.

Q I didn't ask you anything else.

A I'm sorry.

Q Subsequent to Mr. Habich rendering his opinion to you, and before receiving, or your wife receiving a telephone call from Mr. Martabano, did you make any attempt to contact Mr. Martabano?

A Yes, I did.

Q How long after you brought the car home would that be? [185]

A Immediately

Q That same day?

A No, no, it was late, they were closed.

Q The following day?

A The following day, yes.

Q Did you in fact speak with Mr. Martabano on the phone?

A I believe I got the service manager again.

Q Did you ask to speak to Mr. Martabano on the phone?

A Yes. He was not available.

Q You then asked to speak to the service manager?

A That's who answered the phone.

Q The service manager answered the phone when you dialed?

A That's who I got. I really don't know if the secretary passed me on to him or he answered the phone. That is who I was speaking with.

Q Getting back to the date on which you picked up the automobile, you said that you looked at the engine before taking the car? [186]

A Yes.

Q I believe you said that you knew that the engine was a junkyard engine?

A That was my feeling.

Q That was your feeling?

A Yes.

Q Did you have any concrete knowledge?

A No, this was my feeling from its appearance.

Q From its appearance?

A Yes.

Q Have you ever personally done any engine work?

A Personally, very little.

Q Have you ever taken any courses?

A In high school, like we all did, auto shop.

Q Auto shop?

A Yes.

A Are you of the opinion that you can tell whether or not an engine is in good or bad shape based on its exterior look?

A I wouldn't think so, no. I go by performance.

Q Would you say you have enough knowledge to know that a minor problem can throw an engine completely out of whack? [187]

A Definitely, I have had them.

Q A major problem can be undiscoverable for sometimes thousands of miles?

A Of course.

Q After you brought the automobile home, was any attempt made to repair it, by you or anyone else?

A Yes.

Q Who attempted to repair it?

A Myself, and any of my friends that had more expertise than myself, which all drew a blank. We wound up hiring a professional mechanic.

Q Did that professional mechanic repair the automobile?

A Well, that's how I sold it. He took two days to fix it. After two days, he got it running.

Q I didn't ask you that. Before you sold it, did you make any attempts, whether by yourself or with the use of other people, to repair the automobile? [188]

A Of course.

Q Who was it, aside from yourself, who attempted to repair the automobile?

A When you say — could you please define repair?

Q Allow it to run in a manner in which it was supposed to the day it left the factory.

A I didn't take anything apart.

Q Go ahead, you didn't take anything apart?

A I didn't take anything apart, just went on performance and looks. The car wouldn't run, so we sold it, and I couldn't sell it until someone could start it. A professional mechanic took two days and he started it.

A That mechanic that started it, is he also the individual who bought the car?

A No.

Q Was he brought in by you or was he brought in by the purchaser?

A By the purchaser.

Q Had the purchaser committed himself to purchasing the automobile prior to bringing in a mechanic? [189]

A Only if he could get it running.

Q You say the mechanic took two days?

A Two days in the driveway.

Q The first day that he worked on the automobile, what time did he arrive?

A I'd have to get you those dates.

Q No, I am interested in the hour of the day that he arrived.

A I don't know, I was working. I told this friend of mine.

Q When you say he worked two days, you don't know how many hours that constituted in labor?

A No, I really don't.

Q It could have been one hour, it could have been ten hours?

A It could have been — I really don't —

Q You don't know?

A No.

Q When he had the automobile running, did he tell you what was wrong with it, why it wouldn't run?

A Yes, he started off with —

Q Did he tell you? [190]

A Yes.

Q What was it that he told you?

A He told me all the wiring in the car is bad.

Q When you say all the wiring in the car –

A The engine wiring was all bad.

Q In terms of that it was wired wrong, or the quality of the wire?

A Quality.

Q Condition?

A Condition, yes.

Q Go ahead.

A He told me the engine wiring was completely shot, would have to be replaced. He said three out of the four sparkplugs are frozen, and they were questionable if they were going to get them out without breaking them inside. The carborator he thought had to be taken apart and cleaned, because it had been outside too long. He said, "You definitely need a new alternator, because it is all rusted, no way you can repair it." That's as far as I was involved. I sold the car very cheap because of the condition. [191]

Q When the car left your driveway, it was running?

A I wasn't even home.

Q But if left under its own power?

A I really couldn't say if they towed it away or drove it away, because I wasn't home.

Q But the condition of the sale was that the car be moveable under its own power?

A Yes, because he needless to say wanted a –

Q That was the condition of the sale?

A He said if he could get it running, he would take it for $800.

Q He paid you $800?

A Yes, which was half price.

Q I didn't ask you that.

A I'm sorry.

Q You don't claim to be an expert in automobiles, do you?

A Yes. Well, price is a hobby of mine, just buying and selling, being aware of prices.

Q You buy and sell cars regularly?

A Well, I just bought a Porsche. [192]

Q I didn't ask you that. Do you buy and sell cars regularly?

A What do you mean by regularly?

Q Do you buy more than three or four automobiles a year?

A Occasionally I have.

Q Do you do it –

A I have bought as many as ten in one year. I have bought as much as one in one year. I have bought none in one year.

Q Do you buy them for purposes of resale?

A Love and resale, yes. I just happen to like certain cars, like a lot of us.

Q Do you buy the automobile for purposes of personal use, or for purposes of making a profit?

A Personal use and investment.

Q You are familiar with the values of automobiles therefore?

A I feel I am.

Q For how many years have you been involved in the purchase of and sale of automobiles?

A I am thirty-eight now. Twenty-three years.

Q Since you were fifteen years old? [193]

A Yes.

Q When purchasing an automobile, what guide do you use to determine what the appropriate price should be?

A Book value.

Q Which book?

A Wholesale.

Q What book do you consult?

A Wholesale book value.

Q I understand that. I understand there is a wholesale book value and a retail book value. What is the name of the book that you —

A I don't have a book that I resort to.

Q How is it that you determine what the wholesale value is?

Q Since you were fifteen years old?

A Yes.

Q When purchasing an automobile, what guide do you use to determine what the appropriate price should be?

A Book value.

Q Which book?

A Wholesale.

Q What book do you consult?

A Wholesale book value.

Q I understand that. I understand that there is a wholesale book value and a retail book value. What is the name of the book that you —

A I don't have a book that I resort to.

Q How is it that you determine what the wholesale value is?

A I generally go by the New York Times and take an average price; so much below is that much better of a buy, and so much above, you are paying that much more than the average price.

Q Is it your opinion that the prices listed in the New York Times constitute wholesale prices?

A No, I think you can get a fair retail price and work off of that. [194]

Q I want to know what your opinion is of the prices listed in the New York Times. Are they wholesale or retail?

A They are retail, and that is how I —

Q What percentage below that constitutes wholesale?

A I really couldn't say. I am not that much of an expert on wholesale prices. It's all according to what the car is worth to me in value.

Q When you say worth to you, is that an instinctive reaction?

A One of investment.

Q How would you know whether to pay $1000 for a car or $10,000 for a particular car, that same car?

A By being aware of the current retail price. How much under that would determine if I want the car or not, and the condition of it.

Q In terms of condition, how is it that you determine the car's condition?

A By getting an honest valid mechanic to check it out. [19

Q Is that the only basis for deciding whether or not the car is in good condition?

A Well, being I am not a mechanic myself, that is my best route, to get a good mechanic to check it out.

Q That would be as to the running condition of the car. What about other aspects of the car?

A You can look at the body. I looked the body over to see if it had been hit or tried to see if it had been hit or repainted; just the general condition.

Q What is it that you do in order to determine—

A I look at it.

Q How?

A With my eyes.

Q Where do you look?

A Where do I look at the car?

Q Where do you look in order to determine whether or not an automobile has been hit?

A You look down the sides, look down the front, the top, underneath, see any frame damage. That's about all I know about cars; try to see if it was repainted. [196]

MR. MATLIN: Off the record. [Discussion off the record.]

Q I believe you testified that you had previously seen the stipulation of settlement?

A Yes.

Q That stipulation of settlement was not in fact entered into; is that correct?

A Is that the paper I just look at?

Q Yes.

A Right.

Q I believe you stated that after discussing this matter with your attorney, you did not feel that you could enter into this stipulation because of the expense and—I don't recall the exact words.

A Financial loss to myself, personal aggrevation.

Q When did you come to this conclusion that you would not enter into this stipulation?

A I really do not recall the date at this time.

Q Was it one month after your wife was arrested? [197]

A I really do not recall the date at this time.

Q I'm not asking for a date, I am asking for a point in time, more or less. Was it one week after your wife was arrested?

A I really couldn't answer that.

Q Was it one month after your wife was arrested?

A I don't know if it was ten years. I do not recall the date at this time.

Q When is it that you first began speaking with your attorney regarding the possibility of settling this matter under the terms and conditions set forth in the stipulation?

A The date I'm not clear on.

Q Approximately.

A Approximately I am not clear on.

Q How soon after your wife was arrested?

MR. STIX: Excuse me, why don't you show him the document to see if it refreshes his recollection.

MR. MATLIN: I don't want to show him a document, I want to refresh his own recollection. [198]

THE WITNESS: It is not being done.

MR. STIX: He said he doesn't know.

Q Did there come a time when you spoke with your attorney about settling this matter, on the following basis; that you would pay Bano Buick $341.34 in return for which they would withdraw the accusatory complaint against your wife?

A That was considered at one time.

Q How early after your wife was arrested was that considered, immediately?

A I would consider it immediately, because no one wants to have their wife arrested.

Q It was discussed with your attorney immediately?

A I did not say that, you did.

Q Was it discussed with your attorney within a short period of time after your wife was arrested?

A As I said five times already, I do not recall the time at this time.

Q Was it considered a short period after your wife was arrested? [199]

MR. STIX: I object to the form of the question, definition of short.

Q When did you first hire Mr. Stix, or when did your wife first hire Mr. Stix?

A I don't know what date she did hire him.

Q Was it before July 14, 1977, which is the date on which your wife first appeared in court after her being arraigned?

A I would believe we would have appeared with an attorney, but I'm not sure. Yes, I think it was.

Q Aside from the time she appeared before Judge Bender for arraignment, did she ever appear in-court without counsel?

A Regarding this?

Q Yes, of course, regarding this.

A You mean the night she was let out of jail?

Q Aside from that night, did she ever appear in court on the charges?

A I don't believe so.

Q She always appeared with her attorney?

A I would hope so. [200]

Q I believe you testified that you were there at all times?

A I was accompanying my wife.

Q She appeared with counsel on July 14?

A I really couldn't say.

Q Have you ever had any counsel other than Mr. Stix represent you wife on this particular charge?

A I don't believe so.

Q You don't believe so, or you don't know?

A I don't know.

Q You don't know whether or not you hired other attorneys?

A No.

Q No what?

A No.

Q No, you don't know, or no, you didn't?

A No, I don't know.

Q Do you know approximately when Mr. Stix was hired?

A No, I do not.

Q Did you pay Mr. Stix a fee, or did your wife pay Mr. Stix a fee for representing you or representing your wife in the criminal manner? [201]

A My wife handles all financial matters.

Q Was a fee paid?

A I don't know.

Q Then when you said that you were financially in the hole, which I believe were the words that you used?

A Yes.

Q If you had no knowledge, how would you know you were in the hole?

A I had no knowledge of what? I don't understand your question.

Q That any fee had been paid.

A Now you are talking about fees. I wasn't talking about fees when I made that remark, I was referring to the cost of the car, the retail cost of the car, what I could have sold the car for with a 1973 engine in it that was working, that I paid over $600 for. Do you understand that?

Q I do.

A It's very simple. I spent over $700, and I sold the car for $800, and it was worth $2000. That is why I was financially behind the eight ball.

Q When did you sell the car? [202]

A I sold the car—the date is not available.

Q Approximately?

A Approximately it's not available at this time.

Q I believe you stated that you sold the car some months after?

A Oh, yes, it was a few months.

Q Was it subsequent to your wife's arrest?

A Well, of course.

Q You sold the car after your wife's arrest?

A Of course.

Q Was that some months after your wife's arrest?

A I believe so, yes. We were trying to get this settled and satisfy all parties. We just wanted a working car.

Q Was it sold after the summer months in 1977?

A Possibly.

Q So that prior to selling the car sometime after the summer of 1977, you had that car in your possession? [203]

A Of course, at all times.

Q Am I correct in stating that the only, "loss" you had sustained in terms of the car was the—was what? What was the loss that you had sustained at that point?

A Let me understand your question.

Q What monetary loss had you sustained at the date that your wife was arrested?

A There was—

Q Out of pocket.

A Out of pocket, my car that I paid—

Q Out of pocket.

A Are you going to let me answer your question?

Q No, you are going to answer my question. Out of pocket.

A I don't understand your question.

Q Cash, checks; what did you lay out in dollars prior to your wife's arrest?

A I laid out over $2000 for an Opel, and I could not sell it for more than $800, so therefore I calculate approximately $1200 lost out of pocket, plus $700 for repairs comes up to almost $2000 out of pocket. [204]

Q What was the $700 that you laid out? What was it for?

A I really don't know.

Q What was the $2000 you laid out?

A I really don't know.

Q What was the $800 you said you laid out?

A I didn't say that.

Q What was the $1200 you laid out?

MR. STIX: I object to the form of the question. You are badgering the witness.

MR. MATLIN: I am asking him to answer my questions.

MR. STIX: You are not stopping long enough for him to answer your question.

MR. MATLIN: He answered each one so far.

MR. STIX: Go ahead.

Q Did you lose $1200 on the automobile by your calculations?

A By my calculations, definitely. Over $1200, I'm sorry. [205]

Q Over $1200?

A Well over, closer to $2000.

Q When you brought the car to Bano Buick the second time with the engine not working, what in your estimation as an automobile connoisseur was the value of the car?

A Without an engine, approximately $800 to $1000.

Q When you left Bano Buick with the car, is it your testimony that the car still was worth $800 to $1000?

A I didn't think it was worth $800, because the engine wouldn't start.

Q The engine wouldn't start when it was brought in, either.

A No, but if you put a good engine in it, you get $1600 for it.

Q The car was, in your estimation, in the same condition it was when you brought it into Bano Buick?

A Not really. Actually, it was much worse. I had a '73 engine and I came out with a '70 engine. I had a new alternator [206] and I came out with an old alternator. I had a good carborator in my car and I came out with bad carborator in my car. I had a good battery in my car and I came out with a bad battery. I came in with good wiring in my car and I came out with bad wiring in the car. I came in with sparkplugs that would come in and out quite easily.

Q Is it your estimation that the car was worth no more or no less than it was when you brought it in, or is that not correct?

A I just answered that question.

Q Is that correct or not correct?

A That is incorrect.

Q It was worth less in your estimation?

A Wait a minute, repeat your question.

Q When you left Bano Buick with your automobile, is it your—

A With Bano's engine in it?

Q Whoever's engine was in it, is it your opinion that the car was worth less than it was when you brought it in?

A Positively.

Q I believe you said you sold the automobile approximately [207] two months or so after your wife was arrested?

A I believe it was more than two months.

Q Three months after your wife was arrested?

A Possibly four, five.

Q Would that be October, November, 1977?

A As I said, I do not recall the exact date.

Q Approximately.

A Approximately I do not recall.

MR. STIX: We have a stipulation in the record that he is going to get the paperwork and we are going to fill in the exact date in the transcript.

THE WITNESS: I said that.

Q You said you had a conversation in Mr. Martabano's office, with Mr. Martabano, subsequent to your taking the car; is that correct?

A That's correct.

Q Do you recall approximately how soon after you took the car that conversation occurred?

A Within a month. A couple of weeks, a month. [208]

Q More than two weeks, but less than four weeks, is that a fair statement?

A I would guess at that.

Q It was not less than two weeks, though?

A I am guessing. You are asking for specifics now.

Q Did you contact Mr. Martabano to set up this meeting, or did he contact you?

A I believe we called each other many times. I believe we missed each other many times, that is why I showed up in person.

Q Did you show up based on an appointment?

A No, I showed up on my own.

Q There was no appointment?

A No, there was no appointment.

Q You arrived at the showroom?

A Yes.

Q Mr. Martabano was present?

A Yes.

Q You went into his office?

A Yes.

Q The two of you sat down and you had a conversation? [209]

A Tried to resolve this thing.

Q What was your request of Mr. Martabano by way of resolving it?

A I wanted Mr. Martabano because of the fact that I never authorized him to—

Q I only want to know what you requested, not the reason.

A My request was for him to take out what he put in and put in what I wanted him to put in in the first place, which was the engine of my choice, not his manager's. I wanted a '73 engine in a '73 car, because a '70 engine—

Q I'm not interested in that, I just want to know what you wanted, not why you wanted it.

A I wanted my engine of my choice in my car.

Q What was it exactly that Mr. Martabano said that he would do to solve this problem, if anything?

A Mr. Martabano told me that it makes absolutely no difference if it's a '70 engine or a '73 engine, it's the same engine, there is no way of telling what year it is.

He then picked up the phone and called, he said his nephew [210] who supposedly owns Bedford Auto Wreckers and interpreted through the phone asking his nephew. "It's a great engine, my nephew said it's a great engine, it had low mileage, my nephew said it had low mileage." That is the way the conversation went. That's the way it ended.

Q Did you, subsequent to that conversation, tell Mr. Martabano anything about how the automobile was running?

A It wasn't running.

Q Yes or no, did you or did you not?

A Yes, I did.

Q Did you tell him it was not running?

A Yes, I certainly did.

Q When you told him it was not running, what if anything did he say?

A He said, "Bring the engine back to me, I will take it out and I will put in a new one, but I have to charge you for it, and I don't know when I can get to it."

Q Did he indicate to you whether or not he would repair the engine that was in the car?

A Supposedly from the start— [211]

Q I didn't ask you that. Did he indicate whether or not he would repair the engine that was in the automobile?

A It was unrepairable.

Q That is your conclusion. I want to know—

A That's on the bill.

MR. STIX: No, wait a minute.

Q The engine that was in the car, not the engine that you brought the car in with.

A Yes, he did.

Q Did you indicate to him whether or not that would be satisfactory or unsatisfactory?

A Yes, I did.

Q What was it you indicated?

A I indicated the '70 engine does not belong in a '73 car, so therefore it would be most unsatisfactory to me.

Q Unsatisfactory?

A Yes.

Q He stated to you that he would only replace the engine at your cost? [212]

A Yes.

Q At that point, did the conversation end?

A That was it.

Q You picked yourself up and you left?

A I shook Mr. Martabano's hand and we left.

Q Did you at any time indicate to him whether or not you were going to—or your wife was going to pay what was then an outstanding bill?

A No, I did not.

Q You did not what, you didn't indicate or you didn't—

A As I said, we shook hands, and that was the end of the conversation, there was nothing more to do, we came to no agreement.

Q You did not indicate?

A I made no indication of any kind.

Q And you left?

A I left.

Q Did you have any further conversation, subsequent to that meeting, but before your wife's having been arrested, with Mr. Martabano, or anyone else connected with Bano Buick?

A Before my wife's arrest? [213]

Q Before your wife's arrest, and after this meeting with Mr. Martabano, between whatever date it was and June 30?

A Not that I recall.

Q Did you have any conversation with anyone from Bano Buick after June 30 and the date on which the charges against your wife were ultimately disposed of?

A Not that I recall.

Q Do you have any idea whether or not Mr. Lister still has the car?

A I do not believe he does. I think it is long gone.

Q Do you know approximately how long he had that car before he disposed of it?

A In reality, I lost contact with him immediately after he bought it, so it is unfair for me to make any comment on the car after that.

MR. MATLIN: I have no further questions.

MR. STIX: I have some questions.

EXAMINATION BY [214]

MR. STIX:

Q When you had Mr. Habich look at your car, after you got it back from Mr. Martabano, can you tell me what he did? Were you with him when he looked at the car?

A Yes.

MR. HENSON: We have been over this twice.

MR. STIX: He wasn't asked why.

MR. HENSON: Why what?

MR. STIX: In other words, did he do this, did he do that. He said no. He wasn't offered an explanation as to how he came to an opinion. I am going to find out how he came to an opinion.

MR. HENSON: How who came to an opinion?

MR. STIX: How my client came to an opinion. let me ask the question, then object to it.

Q You indicated that it was your feeling that the engine placed in your car was the same engine you saw at Bedford Auto Wreckers? [215]

A Yes.

Q Can you tell us how you came to that opinion?

A Visual.

Q What visual clues did you look at to come to that conclusion?

A Just a different manifold, different set ups on the engine from the early one than the newer one that I had, and general appearance.

MR. MATLIN: Which manifold?

Q You are talking about the different model year engine?

A Yes.

Q The model year engine 1970, where did that have its manifold?

MR. MATLIN: Which manifold?

A I'm not sure.

Q You observed the engine that was placed in your car by Mr. Martabano?

A Yes.

Q Where did this observation take place?

A In front of my house.

Q Can you describe what you saw when you looked at it? [216]

A An old corroded engine.

Q Describe it in more detail as far as the manifold and differences that you saw.

MR. HENSON: We have been over this at least twice it seems to me.

MR. STIX: I don't think we did go over it. He said in his opinion it was the same engine. He wasn't allowed to state what the basis of his opinion was. Now, I would like to find out what the basis of his opinion was, and unless you gentlemen have an objection—

MR. MATLIN: I object to the form of the question.

MR. HENSON: You are just having him testify as to visual stuff.

MR. STIX: I want to know what visual stuff.

MR. HENSON: We have been over that three times. This is the third time.

Q What did Mr. Habich say to you, if anything, concerning the removal of the sparkplugs in this second engine? [217]

MR. HENSON: Asked and answered.

A They would not come out.

MR. HENSON: Just a minute, there is an objection. Asked and answered.

Q I show you what has been marked Defendant's Exhibit I for identification. You previously identified that?

A Yes.

Q Where did you see that document before?

MR. MATLIN: Why don't you start with did he see it?

MR. STIX: He already said he saw it.

A I saw this with you.

Q Where were you when I showed it to you?

A In court.

Q In court in what town?

A Mount Kisco.

Q Did we have a conversation about it?

A A short conversation, yes.

Q Can you remember the conversation?

A As far as I remember, it was to b› considered to resolve this whole thing. [218]

Q Were you asked to sign it?

A Yes.

Q Was Mrs. Conway asked to sign it?

A Yes.

Q Was it signed by you or by Mrs. Conway?

A No.

Q Can you tell me why it was not signed?

MR. HENSON: I object to this whole thing.

MR. STIX: I think it's proper.

MR. MATLIN: There is nothing on there that requires Mr. or Mrs. Conway's signature.

MR. STIX: Do we have the usual stipulations?

MR. HENSON: Do you want to pay for half of this examination?

MR. STIX: Absolutely not.

MR. HENSON: You are going on and on.

MR. STIX: If that is the objection—

MR. HENSON: This is our examination. If you want to preserve it somehow, I think you should be paying for half of the examination. [219]

MR. STIX: We have the usual stipulations, and I think we should be—

MR. HENSON: This is for our examination not for yours.

MR. STIX: You are objecting to it because I won't pay for half the record?
I have no further questions.

• • •

JEFFREY CONWAY

Subscribed and sworn to
before me this day
of , 1981.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(SAME CAPTION)

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82 Civ. 4521 (M.J.L.)
Pro Se Motion Dated September 2, 1983
Supplemental Affidavit

Lynn H. Conway being duly sworn deposes and says:

1. I am the plaintiff in the within action and make this supplemental affidavit in further support of the affidavit in opposition to Defendant Cerbone's Motion for costs and attorneys fees and in support of the cross-motion because in the heat of suddenly discovering the absence and abuses of the former attorney of record, Mr. Stix, deponent believes that the supporting affidavit was not fully articulated.

2. With respect to the *pro se* motion dated September 2, 1983 for relief from the judgment(s), please be advised that the said motion is also intending to ask leave of the court to amend the action to conform with the evidence and thus, permission is requested to serve Defendant Cerbone as an individual since he is shown in the transcript annexed as exhibit A to the supporting affidavit, as the attorney who advised Defendants Martabanos to bring a criminal complaint and to seek a criminal arrest warrant, despite knowledge that the sole issue was one of stop payment.

3. The evidence from the EBT's shows that Defendant Cerbone conspired as an individual and later as a judge to violate the herein plaintiff's civil rights.

4. Due to the on-going conspiratorial nature of the case in Mt. Kisco where Detective McKinsey's failure to conduct a proper police investigation is a triable issue of fact from his denial of seeing the bank letter and advice dated May 26, 1977 when the state police officer who accompanied Detective McKinsey can corroborate plaintiff's testimony to the effect that Detective McKinsey was shown the second bank advice (letter), and where the Mt. Kisco Court failed to produce an assistant district attorney until well over a year after the plaintiff's arrest, the occurrences upon which the plaintiff's claims are based should not succumb to the statute of limitations. Moreover, the EBT's of plaintiff clarifies that Detective McKinsey was informed of the stop-payment letter during his phone calls to the plaintiff, prior to the arrest.

5. Even where, as officials, Detective McKinsey and Defendant Cerbone are immune from damages, the court can in it's discretion fashion a declaratory remedy in behalf of the plaintiff.

In view of the foregoing the Defendant's motion should be denied and the cross-motion be in all respects, granted.

LYNN H. CONWAY
Plaintiff-Pro Se
68 E. Post Road
White Plains, N.Y. 10601
(914) 949-7880

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(SAME CAPTION)

Pro Se 82 Civ 4521 (MJL)
AFFIDAVIT IN OPPOSITION TO
CROSS MOTION BY DEFENDANTS
VILLAGE OF MT. KISCO
AND DETECTIVE McKINSEY

LYNN H. CONWAY deposes and says:

1. I am the herein plaintiff.

2. Notice of Cross-Motion by Defendants Village of Mount Kisco and Detective Larry McKinsey requesting fees and received September 7, 1983 does not fit the language of the Motion by Defendant Cerbone with respect to the timeframe set forth therein by cited local rule of the Southern District of New York governing the scheduling of such papers, as herein.

3. In view of the foregoing, it appears by logic to this plaintiff that the instant cross-motion is *untimely*.

4. Resultant from the foregoing the cross-motion should be disregarded by the court and dismissed as untimely.

5. With respect to those portions of the Defendants' Cross-Motion which deal with Plaintiff's Cross-Motion, the following is pertinent:

a) Judge Bender may well have issued the arrest warrant in good faith *on his part*;

b) circumstantial evidence from the EBTs, however, is such that McKinsey clearly *knew and* should have known through proper police investigation the true status of plaintiff's dispute with Martabanos to be an issue of "stop payment" before he petitioned Judge Bender to grant the arrest warrant: thus there was never "probable cause" for the warrant to issue nor for its execution;*

c) Defendant Cerbone, as an attorney, was allegedly informed by Martabanos of the correct nature of the dispute; yet he is alleged to have conveniently "advised" that the matter was "criminal" where Martabanos knew otherwise. Alternatively, it is unfair to accept at face value, ie, without a trial, Martabano's "good faith" contention citing reliance upon "advice" from the Defendant Cerbone (who was not yet under State censure) where Martabano prosecuted a private criminal complaint *pro se and* where there has been no EBT of Cerbone. In light of the EBTs and defendants' misrepresentations thus far in the lawsuit, the Defendants' good faith defenses must be evaluated at this stage as too weak to "carry the day." Defendants after all for purposes of their "neat" motion to dismiss misrepresented to this court to the extent that all details of plaintiff's and plaintiff's husband's efforts to resolve the dispute — and what was revealed by those details — became *nothing*;

d) The actions of McKinsey, Martabanos and Cerbone, as a lawyer and individual, infer that Judge Bender was *caused* to issue a warrant by Cerbone, Martabano and McKinsey acting in bad faith and "in concert." Note that plaintiff is shown in the EBTs to have advised Martabano and McKinsey of the *Bank error* before the issuance of the warrant;

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* In McKinsey's EBT it is shown that plaintiff advised McKinsey that she had spoken to an attorney [Levy & Eisner, White Plains, N.Y.] — after McKinsey's first call to her at 11:00 p.m. — about the true nature of the offense and before the arrest warrant was petitioned from Judge Bender. Many of plaintiff's coworkers heard these details when they occurred.

e) Attorney Stix's allegation that Cerbone signed the arrest warrant is obviously an issue of competence (or incompetence) which should not reflect upon the lay status of the plaintiff;

f) The dismissal of plaintiff's appeal (Defendants' Exhibit Village I) should be subject to a motion for reinstatement inasmuch as attorney Stix withheld from plaintiff all information on the status of the appeal. Plaintiff, in equity should be permitted to substitute counsel or to obtain information from the Court of Appeals to reinstate the appeal;

g) The stop payment issue was entirely misrepresented to this court by the defendants who should have disclosed to the court the EBTs or at least what these EBTs said. The defendants' motion to dismiss unconscionably suppressed vital details of the transactions and communications prior to the plaintiff's arrest. Attorney Stix's failure to provide the EBTs in the plaintiff's affidavit in opposition to the motion to dismiss was an issue of technical error by an attorney which should not penalize any plaintiff where there can be articulated by amendment a set of facts upon which relief can be granted.

In view of the foregoing, the Plaintiff's Cross-Motion should be granted and the Defendants' Cross-Motion dismissed in all respects.

LYNN H. CONWAY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(SAME CAPTION)

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82 CIV. 4521 (M.J.L.)
REPLY AFFIDAVIT TO
ATTORNEY HENSON'S AFFIDAVIT
OF FEBRUARY 14th, 1984

LYNN H. CONWAY, being duly sworn, deposes and says:

1. I am the Plaintiff *pro se* herein and respectfully request that the court hear this reply to the Affidavit dated February 14, 1984 by attorney Henson who is misrepresenting the facts and the issues herein.

2. There is a motion pending before this court for relief from the judgment. That motion is based upon the defendants having failed to disclose to this court material fact contained in EBTs had prior to the complaint adjudicated by the court.

3. The EBTs contain fact; namely that Judge Cerbone, as an individual attorney conspired to violate my rights to due processes of law by advising his client Martabano to swear that the check upon which my arrest was made was issued by me in bad faith when Cerbone knew from his client, Martabano, that the check was a matter of stop payment.

4. Plaintiff's informing this court of the decision — ousting Judge Cerbone — by the New York Court of Appeals bears upon this case in that it further deminishes the propriety of Defendant Cerbone's motion for attorney's fees by reason of his "absolute immunity" where his judicial conduct was absolutely

shocking to men of right conscience. Moreover, his ousting further points up the general volatility of the "Judge" who *de facto* as an individual engineered my arrest and then as a magistrate presided over my case for two years before he brought in the Westchester County district attorney. Accordingly, the herein injuries continued with each new day of the conspiracy and thus, Defendant Cerbone is summonable and servable in his indivisual capacity.

5. The EBTs also show that McKinsey was appraised prior to arresting me that the check was a matter of "stop payment"; thus, he was bound to investigate so as to ascertain whether there was probable cause for my arrest. As set forth on page 2, sec. # 2 of plaintiff's supplemental affidavit dated September 6, 1983 a triable issue of fact is in evidence. Accordingly, McKinsey is summonable and servable, as an individual.

6. The general public is tired of attorneys who patronize as a cover for misrepresentation of material matters of fact and law.

7. Despite attorney Henson's interpretation of my position, several real issues are obvious: the essence of "res judicata" and its subdivisions is supposed to be "fairness;" FRCP 15 (b) provides that the EBTs, freely entered into by the parties, should constitue the amending of the pleadings to conform to the evidence. In relation to amending this action, attorney Close has objected to the court letter dated February 13, 1984. A copy of Attorney Close's letter together with a copy of my reply thnereto is annexed herewith as *EXHIBIT "1"*.

8. Attorney Close alleges that the material allegation of the complaint relating to Defendant Cerbone is as he cites it in his letter. What he is really saying is that the complaint, as he portrays it, is inaequate as a matter of law. Even if this were so, he should know that an action may attain an adequate status through the court's own initiative when it is clear that the complaint is inadequate as a matter of law. *Coggins v Carpenter* 468 F. Supp. 270, 279 (E. D. Pa. 1979).

8. It is respectfully requested, therefore, that plaintiff's motion be granted in all respects.

LYNN H. CONWAY

PETITIONER'S

BRIEF

(5)

No. 84-1947

Supreme Court, U.S.
FILED
APR 12 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

VINCENT T. CERBONE, as Justice of the Village Court, Village of Mt. Kisco, New York,

Petitioner,

—and—

BANO BUICK, INC., ALFRED MARTABANO, and ALFRED V. MARTABANO,

Co-Petitioners,

—against—

LYNN H. CONWAY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER AND CO-PETITIONER

BARRY, MCTIERNAN & MOORE
BY MICHAEL F. CLOSE
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GEORGE J. CALCAGNINI
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New York, New York
11 April 1986

Petition for Writ of Certiorari filed June 12, 1985
Petition for Writ of Certiorari granted January 27, 1986

Questions Presented

1. In this §1983 action for malicious prosecution, which the district court dismissed on finding that "defendants did not deprive the plaintiff of any constitutionally protected right" (A39), did the Second Circuit err when it held that 42 U.S.C. §1988 incorporates as a §1983 claim New York's common law of malicious prosecution (A25-A27), without identifying any "right[], privilege[] or immunit[y] secured by the Constitution and laws", contrary to Baker v. McCollan, 443 U.S. 137 (1979), which rejected exactly this analysis in a false arrest case?

2. Did the Second Circuit err in holding that a malicious prosecution is of constitutional magnitude because it

alleges "great humiliation, ridicule and mental anguish" (A4), and an arrest under warrant which the Court elsewhere held time-barred (A22), contrary to Paul v. Davis, 424 U.S. 693, 697 (1976), which rejected common law defamation as a §1983 claim?

3. Even assuming that the interest in freedom from unjustified litigation protected by common law malicious prosecution is either "liberty" or "property" under the Fourteenth Amendment, does the complaint state a claim under the Due Process Clause in light of Parratt v. Taylor, 451 U.S. 527 (1981), Hudson v. Palmer, __U.S.__, 104 S.Ct. 3194 (1984), and Ingraham v. Wright, 430 U.S. 651 (1977), since the acts complained of were random, unauthorized, and tortious under state law, which provides an adequate and parallel tort remedy?

4. When the Second Circuit below rejected the application of Parratt v. Taylor, 451 U.S. 527 (1981), Hudson v. Palmer, __U.S.__, 104 S.Ct. 3194 (1984), and Ingraham v. Wright, 430 U.S. 651 (1977), to a §1983 malicious prosecution due process complaint, did it misconstrue Parratt, Hudson, Ingraham and Monroe v. Pape, 365 U.S. 167 (1961), on which it relied?

Parties Below

The parties to the proceeding below were: respondent/plaintiff, Lynn H. Conway; petitioners/defendants, Justice Vincent T. Cerbone, Bano Buick, Inc.,[1] Alfred Martabano and Alfred V. Martabano; the Village of Mount Kisco, New York, and Detective Larry McKinsey, a police

1. **Designation of Corporate Relationships**
The co-petitioner/defendant, Bano Buick, Inc., has no parent, subsidiary or affiliated companies.

officer of defendant Village. The Court of Appeals affirmed the dismissal of the claims against the Village and Detective McKinsey. Since review of that order has not been sought, the Village and Detective McKinsey are not parties to the proceedings in this Court.

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Judgments and Opinions Below

The opinions and orders of the United States Court of Appeals for the Second Circuit are reported officially at 758 F. 2d 46 (1985), and at 750 F. 2d 205 (1984). They are reprinted in the Appendix to the Certiorari Petition at A1-A7 and A8-A29.[1]

The 15 March 1983 slip opinion of the United States District Court for the Southern District of New York, the Honorable Mary Johnson Lowe, dismissing the claims against the BANOs is not officially reported; it is reprinted in the Appendix to the Certiorari Petition at A30-A39; the 17 January 1983 endorsement order dismissing the complaint against Justice Vincent T. Cerbone is reprinted

1. References to the Appendix to the Certiorari Petition are labeled (A...). References to the Joint Appendix are labeled (JA...).

at A40-A41. The judgment of the district court is reprinted in the Joint Appendix at JA47.

Jurisdiction

The orders of the Second Circuit sought to be reviewed here were entered on 11 December 1984 and 15 March 1985. No petition for rehearing was filed.

The joint petition for certiorari was filed within 90 days of 15 March 1985, i.e., 12 June 1985. The jurisdiction of this Court to review the judgment of the Second Circuit is invoked under 28 U.S.C. §1254(1). The petition for writ of certiorari was granted in part on 27 January 1986.

Statutes Involved

42 U.S.C. §1983, §1988 and the Fourteenth Amendment are reprinted in perti-

nent part in the joint petition for certiorari at 2-3.

The relevant New York statutes relating to arrest, larceny, and bad checks are set out post in an appendix hereto at I to V.

Statement of the Case

In January of 1977 the 1973 Opel owned by respondent Lynn Conway and her husband Jeffrey Conway[2] broke down and was towed to co-petitioners' business, BANO BUICK, INC. ("BANO")(JA87), operated by co-petitioners Alfred Martabano and Alfred V. Martabano, his son (JA80-81).

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2. Jeffrey Conway was a co-plaintiff with his wife in the parallel action in Supreme Court of New York, County of Westchester, for malicious prosecution and false arrest against the BANOS, the Village of Mount Kisco, and Detective McKinsey. In the state court, Mr. Conway sought damages for loss of consortium (JA22). He did not join as plaintiff in the subsequent federal civil rights action.

The engine was repaired for $198 (JA278).

The car broke down again, however, on 15 April 1977, on the same road and was again towed to BANO (JA15; 199). The parties agree that the Conways were told that the Opel needed a replacement engine (JA281-282). They disagree sharply on what BANO was instructed to do. Respondent's version is that BANO and Jeffrey Conway would both look for a replacement engine in various local junkyards, and when either found an engine he would call the other (JA283). Respondent is emphatic that BANO was not authorized to install a different engine without approval (JA203, 204, 209, 267-68, 282, 288). Indeed, in the district court respondent took the position that she stopped payment on 5/11/77 for a check given at 6:30 p.m. the night before because the "repair work . . . was in explicit violation of the agreement

plaintiff had with defendants" (JA36).[3] Jeffrey Conway alleges he found a suitable used engine in a Croton Falls junkyard for $250 (JA283). When he called BANO to report the find, however, he was advised to come pick up his car (JA284). According to him, he was surprised, as BANO had not been authorized to install a replacement engine (JA287-288).

In respondent's view, when Lynn and Jeffrey Conway arrived at BANO they found an old engine installed in the car which Jeffrey himself had seen at Bedford Auto Wreckers and rejected (JA289). Jeffrey demanded to know how old the engine was and got no satisfaction from the BANO employees (JA289). Dissatisfied with the

3. As respondent's attorney put it: "When [respondents] arrived at the [BANO] place of business to pick up their car, they were bullied and intimidated by the service manager and mechanics. In fear they wrote out a check to BANO and initiated their escape" (JA53).

engine, they paid the $431.34 bill only "under duress" (JA294) to "initiate[] their escape" (JA53).[4] Lynn Conway wrote out the check at her husband's direction, No. 154, dated 10 May 1977 (JA26). In her rule 60(b) motion, but not before judgment (JA33-46), she also alleges several deficiencies in the operation of the car, which was ultimately sold for $800.00 several months later (JA309).

The parties agree that at the time Lynn Conway presented to BANO the check number 154 for $431.34, she had in fact written out checks 149 to 153 and had a real available balance of only $361.77, although the bank balance, because two checks had not yet been cleared, stood at $441.37 (JA17; JA28-JA29; JA240-JA244). Therefore, according to respondent's own

4. Under New York law, BANO had an artisan's lien and did not have to release the car until the bill was paid. Lien Law §180.

checkbook ledger balance on 10 May 1977, she did not have the funds to cover the $431.34 check she wrote to the BANOs (JA236-241).[5] According to the BANOs, the check was deposited the next day (JA90). It is undisputed that it was returned to them by the BANOs' bank marked "insufficient funds"[6] (JA27) under a cover note

5. New York's Penal Law §190.10(1) & (3) provides that when a check is returned marked "insufficient funds" it creates a presumption that the drawer of the check knew she had insufficient funds and intended that the check would be dishonored. §190.10 was enacted for the particular purpose of protecting the commercial world. "Innocent transactions may well be presumed to be fraudulent under the provision therein that refusal of payment shall be prima facie evidence of intent to defraud." People v. Siman, 119 Misc. 635, 197 N.Y.S. 713, 716 (County Ct. Montgomery 1922).

6. In the court below Ms. Conway asserted (JA36) that the bank would have honored her overdraft, a questionable assertion under New York law. See S.R. & P. Imports Co. v. American Union Bank, 122 Misc. Rep. 798, 204 N.Y.S. 755 (Sup.Ct. 1924). However, that does not create a defense because the word "funds" as used in the criminal statute is defined as money or credit. Penal Law §190.00(6). New York law is clear that the intention to make a covering deposit is not a defense. People v. Parker, 51 Misc. 2d 843, 274 N.Y.S. 2d 38 (1966). Ms. Conway asserts that had she not stopped payment, she would have deposited

Cont'd.

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from the BANO's Bank dated 18 May 1977 (JA27)[The date of presentation to Conways' bank is not known]. The returned check for "insufficient funds" was the first time that either of individual copetitioners BANO had ever dealt with or heard of the Conways (JA89; JA121). It is also undisputed that Conways' bank statement itself (JA28-JA29) as of 20 May 1977 shows no "stop payment" order (JA201-JA202; JA213), so whether in fact the return for insufficient funds was an error by the bank is a matter of dispute.[7] The BANO's accounting department

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sufficient funds to cover the check the next day (JA36), i.e., within the 10-day affirmative defense period of Penal Law §190.15. However, Ms. Conway apparently fails to perceive that said affirmative defense is triggered only by actual payment, not ability to do so. Ibid.

7. After being called by Detective McKenzie who told her that Mr. Martabano was commencing a criminal complaint, Lynn Conway says she went to her bank on 30 June 1977, the day of her arrest (JA230-JA231) and got a signed letter addressed to Jeff Conway (JA41) that the "insufficient funds" advice was an error and should have been "stop payment". The undated letter does not say Cont'd.

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called the bank after receiving the check back, and after two or three days were finally told that there were sufficient funds to cover the check available (JA91-JA93). Upon redeposit, the check was returned "stop payment" under a notice of 26 May 1977 from the BANO's bank (JA 94; JA145), significantly long after 11 May

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what she claims. First, on its face, the bank's admission of error was limited to an advice it sent on 5/25/77 to the Conways, not the one sent by the BANOs' bank on 5/18/77 to the Martabanos. Thus the letter itself does not bolster Lynn Conway's apparent claim that she stopped payment on 5/11/77 or that respondents "knew" she had done so. Second, the letter is admitted by the plaintiff to have been obtained after the criminal complaint had already been filed, so it has no bearing on probable cause to file such a complaint. Third, whether the bank was merely accomodating a customer with a harmless admission is itself something only discovery could clear up. Ms. Conway does produce a "stop payment" order to her own bank dated 5/11/77 (JA40); there is no evidence that the BANOs received it. What defendants did receive was advice from their own bank on redeposit dated 26 May 1977 that payment had been stopped (JA93-JA94; 145). The discrepancy between the 5/11/77 order (JA40) and the 20 May 1977 statement (JA28-JA29) is a matter for discovery; it does not alter the fact that, as to petitioners, it appeared respondent first bounced the check and then stopped payment.

when Lynn Conway claims she stopped payment.

Respondent's original version in the district court was that she gave the check simply to get possession of the car: "The repair work alleged at paragraph 10(a) was in explicit violation of the agreement plaintiff had with defendants who threatened and intimidated plaintiff into giving over a check at 6:30 p.m. Defendants threatened to remove the repair and impose additional charges" (JA36). If she gave the check on the 10th, intending to stop payment[8] on the 11th, as her testimony suggests,

8. Ms. Conway has alleged that had she not stopped payment on the check, she would have made a deposit the next day to cover the check (JA36). However, "such an intent would not be a defense to the charge; knowledge of whether or not the bank balance was sufficient to cover the check provides the test." People v. Parker, 51 Misc. 2d 38, 40 (Ct. of Special Sessions, Scarsdale, 1966) (case decided under predecessor statute of P.L. §190.05).

then she was guilty of larceny by false pretenses or false promises. Penal Law §155.05 (2)(a), (d). In New York, larceny is a possessory, not a title, crime. Penal Law §155.00(2)(a). "A wrongdoer who obtains possession of property by false representations as to his purpose or intention is guilty of larceny under the statute and at common law" (citations omitted). Sacks v. Hartford Insurance Co., 68 A.D. 2d 48, 416 N.Y.S. 2d 292, 294 (2d Dept. 1979). By her own testimony, she never advised the BANOs of the 11 May stop payment[9] until she was contacted by Alfred Martabano on 31 May (JA210).

9. Her husband claims he called the repair shop to complain about the work on 11 May (JA342). It was a few weeks later that he spoke to either of the Martabanos (JA360), neither of whom became involved in the affair until the check was returned insufficient funds (JA89; JA121).

The parties disagree as to what negotiations took place then. Alfred Martabano claims he offered to take out the disputed engine, put in the desired Croton Falls junkyard engine at no additional charge, and give the Conways $200 credit for the disputed engine (JA100; 103). Additionally, he claims he told Jeffrey Conway that if he would just bring the car back, he would handle it (JA104). Jeffrey Conway denies the offer of $200.00 credit (JA300). According to him, Alfred Martabano insisted that the old engine (which Conway claims was a 1971 engine), was a "good engine" (JA361). It is not disputed that the BANOs made a series of phone calls to the Conways,[10] and were unable to reach any agreement with them about the check (JA15).

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10. The record shows that the calls from the Martabanos to the Conways were made on 31 May; 1, 3, 6, 14, 20 & 21 June 1977 (JA15, 112, 113). Cont'd.

With negotiations at an impasse, the Martabanos consulted petitioner Justice Vincent Cerbone, who had been their attorney and was also the Village Justice.[11] According to Alfred V. Martabano, Cerbone told him that a check returned "insufficient funds" was a crime, and the later "stopped payment" order had no bearing on it, because it was after the fact[12] (JA126). Acting on Cerbone's advice, Alfred V. Martabano then pre-

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11. Extensive discovery was conducted in the state court proceedings. In spite of full discovery therein, Conway has never alleged that BANOs failed to reveal relevant information to Cerbone. Indeed, if she did so, she would defeat any malicious prosecution claim against Cerbone.

12. The record does not contain Cerbone's response to these allegations, because they were not part of the pleadings or the opposition to his motion for judgment. When respondent first made these allegations in a rule 60(b) motion six months after final judgment, Cerbone's attorney simply filed a memorandum noting that Rule 60(b)(2) was not satisfied and therefore new factual issues could not be raised. The Second Circuit, however, reversed on the basis of the rule 60(b) motion.

sented the check to Detective Larry McKenzie of the Village of Mount Kisco police force (JA127-28).[13]

Detective McKenzie received Alfred V. Martabano's complaint and told him to "hold off" and that Detective McKenzie would make a phone call and that Alfred V. Martabano could "come back tomorrow" (JA128, 142). The detective decided to call Lynn Conway about the matter "as a matter of courtesy" (JA142), "in case there is a mistake in issuing the check" (ibid.). According to the detective, he called respondent at home at about 7:00 p.m., advised her in essence that the

13. It is almost universally held that probable cause is established where the prosecution was instituted with the advise of counsel, even though the advise may be erroneous. Prosser, Law of Torts, 4th ed. §119, p.843. Ironically, Ms. Conway made a similar argument in opposition to Cerbone's motion for attorneys' fees when she stated "plaintiff cannot be found to have acted in bad faith since this action was brought on the advice of counsel" (JA71).

Martabanos were making a criminal complaint about the bounced check, and suggested to her that she contact the complainants to get it straightened out. She advised that she would (JA148). He advised her that if the complainants signed a complaint against her she would be arrested (JA148-49). He later received a return phone call from Ms. Conway the same evening and she told him that he was to stop harassing her over the phone and that the transaction of the check was none of his business (JA152). Stripped of their rhetoric about "Nazis" and "Gestapo" tactics (JA313), the Conways' version is only slightly different. Lynn Conway now contends the first call was at 11:00 p.m. and that she called McKenzie back the next morning to tell the detective to stop threatening her (JA207-08; 214-15; 216-17). She also contends the detective

made a second call the next night, inquiring whether she was paying on the check (JA218-220). She said "no" and hung up (JA220). She contends that in the initial conversation she told McKenzie that this was not a bounced check at all, but a stop payment (JA215), and that at that time of her arrest she showed him the allegedly exculpatory undated bank letter which she had gotten the same day (JA229). McKenzie denies seeing either the bank letter (JA165) or any stop payment advice (JA145). At any rate, the detective advised Alfred V. Martabano that Lynn Conway did not intend to make good on the check (JA153). Alfred V. Martabano swore out a criminal complaint (JA61-JA62), which was submitted to Acting Justice Martin Bender (JA49). Justice Bender issued an arrest warrant (JA49; JA63), which as the district court noted, constitutes a

finding of probable cause under New York law (A39). Criminal Procedure Law §120.20(2).

Lynn Conway was arrested at her home at 7:00 p.m. on 30 June 1977 (JA12) by Detective McKenzie and a New York State trooper (JA160). She was arraigned and released without bail on her own recognizance that night about 1:30 a.m. (JA174). Her appearance date was given as 7 July (JA64).

The record shows that Lynn Conway appeared with her then attorney Wayne Stix, on 7 July 1977, and asked for an adjournment to 21 July (JA64). She asked again for an adjournment on 21 July (ibid.). On 4 August 1977 her attorney entered a plea of not guilty and demanded a jury trial (JA49). Also on that date, petitioner Justice Vincent Cerbone disqualified himself from acting on the

case (JA65). The record does not indicate how the case was reassigned or when a new judge assumed jurisdiction. On 1 February 1978, respondent moved to dismiss the charges on grounds of speedy trial (JA49). Although he had disqualified himself, Justice Cerbone denied this motion on 7 March 1978 (JA64-65) because he was the only available town justice (JA51), a fact not contested on this record.

Contrary to her claimed desire for a speedy trial, respondent then took an appeal from the denial of the motion (JA50). The order is clearly non appealable. Criminal Procedure Law §450.10 and §450.15. When the notice of appeal arrived, the court's notes and docket were transferred to Carl Rubino's office, the Westchester County District Attorney (JA50). The record does not show how long petitioner took to perfect

her appeal (i.e., to file the record and serve her brief), but under local practice, nine months is the outside rule. 22 N.Y.C.R.R. §670.16(a) and §670.20(f). Her appeal was dismissed a year later, on 2 March 1979 (JA66).

Following the dismissal of her appeal, petitioner moved again in the Village court for a dismissal which was denied by Joseph Cerbone, petitioner's brother (JA51). She or her attorney repeatedly failed to show up for duly scheduled court appearances, occasioning further delays (JA50-51). Finally, in September 1979, the People moved to dismiss the charges, noting the lapse of time that had occurred (JA51). The motion was granted by petitioner, without objection by respondent to V. Cerbone's presiding (JA51-52).

Petitioner then sued in New York Supreme Court the BANOs, the Village of Mount Kisco, and Detective McKenzie for false arrest and malicious prosecution. (The Supreme Court complaint is at JA19). The suit against the Village and the Detective was dismissed on both procedural grounds, for failure to serve a notice of claim (JA38), and substantively, on quasi-judicial immunity (JA10). (Petitioner did not assert her "conspiracy" theory in state court). Following the dismissal against the Village and Detective, she filed this action in the United States District Court for the Southern District of New York against the above defendants and added Vincent T. Cerbone "As Justice of the Village Court, Village of Mount Kisco" (A43). Her complaint, invoking 42 U.S.C. §1983 and §1985(3), and seeking $1,000,000 compensatory and $1,000,000

punitive damages, and attorneys' fees,[14] is attached to the petition at A43-A49. Cerbone moved for judgment on the pleadings, noting that the complaint pleaded specifically only that he "permitted, encouraged and acquiesced in allowing the malicious and groundless criminal charges to continue until 30 September 1979"; "refused to commence a jury trial" (A46); that he had "decided plaintiff's motion to dismiss against plaintiff and in favor of [the BANOs]" (A46), and like allegations. Significantly, the theories advanced by the opinion below, that the complaint pleads acts by Cerbone in his individual capacity (A6), conspiring with the detective in the detective's official capacity (A6-7), were never advanced in

14. A significant difference between §1983 and common law tort claims is the availability of attorneys' fees in the former, which obviously creates a strong incentive to bring every common law claim within the statute.

the district court. The BANOs moved under Rules 12(b)(6) and 56(b) supported by affidavits and exhibits (JA12-32). The district court dismissed (A30-A41). As to Cerbone, the court held the complaint pleaded acts only in his official capacity, and rejected the contention then advanced by Conway that Cerbone lost his judicial immunity because he had disqualified himself (A40-41). In a later ruling, the court granted summary judgment to the BANOs, holding that the failure of the plaintiff or her husband to respond to the BANOs' attempts to resolve the matter gave them probable cause to make the complaint (A37-39). The district court rejected the argument that abuse of process stated a constitutional claim:

> Even if the intent of the individual defendants were to use the criminal process to collect the debt allegedly owed, where the process used was in accordance with the law of the State of New York, and such process is not constitutionally defective, no federal cause of action is alleged.[15]

(A38).

Six months after the judgment had become final and when plaintiff's appeal to the Second Circuit had been twice dismissed for failure to prosecute, Cerbone filed a motion for attorneys' fees (JA48-68). Construing the gravamen of the compliant against him as directed to a denial of a claimed right to a speedy trial (A46), he pointed out that the great bulk of the delay in plaintiff's criminal complaint was occasioned by her own actions or that of her attorney (JA48-JA52). He also pointed out that the "conspiracy" charge was baseless (ibid.). Plaintiff responded with a

15. The pending state court suit against BANO was later dismissed on res judicata and collateral estoppel grounds as a result of the district court opinion.

third motion to reinstate her appeal in the Second Circuit and a rule 60(b) motion in the district court (JA71-377), which is in this record because she attached it to her motion in the Second Circuit (brief in opposition to certiorari at 9).

The Second Circuit reversed in part (A1-A29). It affirmed the statute of limitations dismissal of the false arrest claim (A22), and affirmed the dismissal of the claims against the Village and Detective McKinzey (A23-A24). Reviewing the extensive sets of proof filed by plaintiff six months after final judgment was entered against her, the Second Circuit held that there was sufficient proof to make out a jury issue under New York's law of malicious prosecution (A25-28). The Second Circuit noted, however, that "Ms. Conway alleges the unconstitutionality of neither N.Y. Penal Law

§190.05(2) nor any state-authorized procedure executed by any of the defendants during her prosecution" (A25 n.12). After receiving Cerbone's brief, the Court affirmed as to him as well. It rejected his claim that common law malicious prosecution implicated no constitutionally protected right, noting that the complaint alleged "great humiliation, ridicule and mental anguish" (A4). It did, however, specifically agree that "substantive due process" did not apply to this complaint.[16]

Summary of the Argument

Ms. Conway presents here only a debatable claim of a lack of probable cause for the bad check charge against

16. "Finally, Cerbone argues that substantive due process should not provide the source of Conway's due process rights. We may agree without denying that those rights have been violated." A5.

her which the court below holds would have to be resolved by a jury.[17] Since all sides agree that her false arrest claim is time barred,[18] the question is whether her "great humiliation, ridicule and mental anguish" states an interest protected by the "liberty" of the Fourteenth Amendment. This Court's precedents on the closely related torts of defamation and false imprisonment compel the conclusion that it is not.

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17. Although the court below, again following New York law, held that the claim of lack of probable cause would have to go the jury, in most jurisdictions the question of probable cause is one for the court. Prosser, Law of Torts, §119, at 846-47 (4th ed. 1971). See, e.g., Dinsman v. Wilkes, 53 U.S. 390 (1851)(probable cause is for the court, not the jury). This is an anomaly of "incorporating" New York's common law of malicious prosecution under the authority of 42 U.S.C. §1988, as apparently the right to a jury trial would vary state to state.

18. Respondent filed no cross petition from the rulings dismissing her false arrest claim under the statute of limitations, or dismissing the claim against the Village and Detective McKinsey. Accordingly, this Court lacks jurisdiction to review those orders. E.g., Federal Energy Administration v. Algonquin SNG, Inc., 426 U.S. 548, 560 n.11 (1976).

Even if we assume that the nature of the interest respondent asserts is a species of either "liberty" or "property" under the Fourteenth Amendment, the due process clause guarantees her only that when state actors tortiously invade a "liberty" or "property" interest, the state will provide an adequate and effective tort remedy. Fourteenth Amendment due process by itself is not a generalized federal guarantee that no state actor will ever commit a tort; it is a guarantee of a real and effective remedy when state actors do commit wrongful acts invading "liberty" or "property" interests. Absent the loss of any right specifically guaranteed by the federal constitution, plaintiff has no federal claim when state actors violate state law.

POINT I

THE INTEREST IN FREEDOM FROM UNJUSTIFIABLE LITIGATION, AS SUCH, IS NEITHER "LIBERTY" NOR "PROPERTY" PROTECTED BY THE DUE PROCESS CLAUSE

Originally, it is suggested by legal historians, "liberty" within the meaning of the due process clause meant only freedom from personal restraint. Hough, "Due Process Of Law - Today," 32 Harv. L. Rev. 218, 222-23 (1918). This concern for freedom from personal restraint was limited to the procedural regularity employed in effecting a restraint, and did not include a substantive examination of the justifications for the deprivation of liberty. See Shattuck, "The True Meaning of the Term 'Liberty' in Those Clauses in the Federal and State Constitutions which Protect 'Life, Liberty, and Property,'" 4 Harv. L. Rev. 365 (1891). Gradually it was argued that the

due process clause protected generally all civil rights of the individual. See Warren, "The New 'Liberty' Under the Fourteenth Amendment," 39 Harv. L. Rev. 431, 439 (1926). Allgeyer v. Louisiana, 165 U.S. 578 (1897), first recognized that "liberty" extended beyond "mere physical restraint." 165 U.S. at 589. Extended beyond its narrow origins, this Court has recognized that liberty

> denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Meyer v. Nebraska, 262 U.S. 390, 399 (1926)(McReynolds, J., for the Court).

Because of the tendency of every legal premise to be pushed to the limits

of its logic, this Court has had to recognize that the interests protected by the due process clause are "broad indeed", Board of Regents v. Roth, 408 U.S. 564, 572 (1972), but "not infinite." 408 U.S. at 570. This Court's well established test is that "the determining factor is the nature of the interest involved rather than its weight." Meachum v. Fano, 427 U.S. 215, 223 (1976); Morrissey v. Brewer, 408 U.S. 471, 481 (1972); Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972). Thus although petitioners concede, for purpose of argument, the "great humiliation, ridicule, and mental anguish" found by the court below (A4) to be the constitutional basis of respondent's claim, and conceding the "weight" to Ms. Conway engendered by such a claim, the question is whether the "nature" of her claim is such as to find the federal constitution

itself, rather than the common law, to be the source of her protection.[19]

Paul v. Davis, 424 U.S. 693 (1976), Baker v. McCollan, 443 U.S. 137 (1979), and Gerstein v. Pugh, 420 U.S. 103, 119, 125 n. 26 (1975), all but foreclose the result. Baker v. McCollan, 443 U.S. at 146, specifically rejected the holding of the Second Circuit below that whatever satisfies New York's common law of intentional torts is ipso facto a constitutional claim (A25-27).[20]

19. The record shows only that "shortly after the arrest" (JA 246) respondent lost a few days from work "here and there intermittently" (JA 247), for which she was paid. The reason was not because of any court appearance but because respondent was "emotionally upset" and "would stay at home and cry" (JA 249). She was not denied credit at any place (JA 251); she had no loss of friends (ibid.); she was not forced to resign from any clubs (ibid.). She was, however, "humiliated" (JA 251) by a neighbor who gave her "odd looks" (JA 252), although respondent does not know this neighbor's first name and has not seen her socially since the occurrence (ibid.). She gave her own version of the event to a local newspaper (JA 252-55). [The record does not Cont'd.

"Great humiliation, ridicule, and

---

contain the newspaper article].

20. The Second Circuit continues to insist that New York's common law of malicious prosecution equates to a §1983 claim: "Because the same four elements must be proved for both the tort of malicious prosecution and the related §1983 violation. . .the claims are virtually identical." Raysor v. Port Authority, 768 F. 2d 34, 40 (2d Cir. 1985)(Oakes, J.)(emphasis supplied). The Second Circuit's "incorporation" approach leads to unacceptable results. For example, it is well settled in New York that a malicious prosecution claim also lies following the successful defense of a civil suit where the plaintiff in the civil suit used a provisional remedy, such as arrest, attachment, injunction, lis pendens or any direct interference with the defendant's person or property. E.g., Burt v. Smith, 181 N.Y. 1, 73 N.E. 495, error dism'd, 203 U.S. 129 (1906). Presumably, therefore, every successful civil defendant within such a rule has a §1983 or Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), claim against the unsuccesful plaintiff, if he can adequately allege some "conspiracy" with a unit of the government under the rule of Adickes v. Kress & Co., 398 U.S. 144 (1970), or makes the claim against the government itself. Second, New York is in the minority in following the restrictive approach to malicious prosecution claims following civil actions, sometimes referred to as the "English Rule". A majority of states follow the Restatement (Second) of Torts, §§674, 677, which lacks the special damage requirement. See Note, "Groundless Litigation and the Malicious Prosecution Debate: A Historical Analysis," 88 Yale L.J. 1218, 1219 (1979). The "incorporation" approach means the scope of §1983 protection varies from state to state.

mental anguish" (A4) are not different from the nature of the interests asserted by Davis in being free from being falsely accused of being an "active shoplifter" in a circular sent by Police Chief Paul to 800 Louisville retail stores. 424 U.S. at 695. Indeed, Lynn Conway is better off. The charges against Davis were made and circulated widely in a manner that precluded his effective reply to the persons before whom the charges were made. Here, there is no evidence that the charge was circulated by petitioners to anyone other than the judicial authorities (nor does the complaint allege as much), and indeed, respondent can boast of the successful dismissal of the charges against her.[21] As Prosser notes, the interest protected by malicious pro-

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21. We assume for sake of argument that petitioner could establish "favorable termination" (A27-28). If she could not, she has no §1983 claim even under the opinion below.

secution "has much in common with that of reputation", Prosser, Law of Torts, §119 at 834 (4th ed. 1971),[22] and there is no principled constitutional distinction between Ms. Conway's interests and Davis's.

Similarly, since the gravamen of malicious prosecution[23] is the lack of probable cause for the complaint, not the arrest, see, e.g., Singleton v. City of New York, 632 F. 2d 185, 189-90 (2d Cir. 1980), cert. den., 450 U.S. 920 (1981), a

22. Accord, Street, The Foundations of Legal Liability (1980), at 327, n. 2; and Townsend, A Treatise on the Wrongs Called Slander & Libel Together With a Chapter on Malicious Prosecution, at 701 note 2 & 702 (4th ed. 1890).

23. "The interest in freedom from unjustifiable litigation is protected only insofar as it involves the interests of reputation, personality or property. Thus, the action for malicious prosecution cannot be based on proceedings unless, as said by Lord Holt, they involve (1) damage to a man's fame, "as if the matter whereof he is accused is scandalous"... Harper & James, The Law of Torts, (1956) at 302.

mere allegation of lack of probable cause does not state a constitutional claim because "the accused [is not] entitled to a judicial oversight or review of the decision to prosecute." Gerstein v. Pugh, 420 U.S. 103, 119 (1975). The record shows that Ms. Conway was released on her own recognizance without bail (JA 64; JA 230). "Because the probable cause determination is not a constitutional prerequisite to the charging decision, it is required only for those suspects who suffer restraints on liberty other than the condition that they appear for trial". Pugh, supra, 420 U.S. at 125 n. 26. Indeed, the record shows that respondent's attorney exhibited a rather cavalier attitude about showing up at all for court hearings (JA 50). Although we can assume that a criminal defendant who suffers "significant restraint on liberty", 420 U.S. at 125 n. 26, may for

that reason alone have a §1983 action against his accusers for malicious prosecution, Ms. Conway can assert no such right.

Properly viewed, respondent's interest in freedom from baseless litigation is "simply one of a number which the State may protect against injury by virtue of its tort law, providing a forum for the vindication of those interests by means of damages actions." Paul v. Davis, 424 U.S. at 712.[24] Indeed, whether New York recognizes Lynn Conway's claim for

24. There are good arguments not to recognize the tort at all:

> "Malicious prosecution is an action which runs counter to obvious policies of the law in favor of encouraging proceedings against those who are apparently guilty, and letting finished litigation remain undisturbed and unchallenged. It has never been regarded with any favor by the courts, and it is hedged with restrictions which make it very difficult to maintain."

Prosser, Law of Torts, supra, at 841.

damages at all is chiefly a question of historical accident.[25] Instructive is Drago v. Buonagurio, 61 A.D. 2d 282, 402 N.Y.S. 2d 250 (3rd Dep't), rev'd., 46 N.Y. 2d 778, 413 N.Y.S. 2d 910, 386 N.E. 2d 821 (1978). Doctor Drago countersued an attorney, alleging that the attorney had sued him charging various acts of malpractice, allegedly causing the death of one Buonagurio, seeking $1,500,000. In fact, Drago alleged, he had never even remotely treated Buonagurio, that no basis at all existed to name Drago as a defendant, and that the suit was begun with malice, and simply to ascertain where responsibility could be placed. 402 N.Y.S. 2d at 251-52. Drago suffered

25. Malicious prosecution arose out of the common law writ of conspiracy aimed at combinations to abuse legal process. Winfield, History of Conspiracy and Abuse of Legal Procedure, 1921; Stephen, The Law Relating to Malicious Prosecution, 1889, 1.; later, an action in case reached the wrongful acts of one. Savill v. Roberts, 1 Ld. Raym. 374 (1678).

"much mental anguish, defamation of character and was otherwise damaged." 402 N.Y.S. 2d at 251. As the Third Department put it: "a clear intentional wrong, causing apparent and foreseeable harm to the plaintiff, without excuse or justification, has been alleged" and recognized a cause of action for prima facie tort, since none of the common law torts applied. 402 N.Y.S. 2d at 253.

The Court of Appeals reversed and dismissed for failure to state a claim. 46 N.Y. 2d 778, 413 N.Y.S. 2d 910, 386 N.E. 2d 821 (1978).[26] In principle, Ms. Conway's injury is not distinguishable,

26. "Whatever may be the constraints imposed by the Code of Professional Responsibility with the associated sanctions of professional discipline when baseless legal proceedings are instituted by a lawyer on behalf of a client, the courts have not recognized any liability of the lawyer to third parties therefor where the factual situations have not fallen within one of the acknowledged categories of tort or contract liability." 46 N.Y. 2d at 779-780, 413 N.Y.S. 2d at 911.

or, at any rate, not constitutionally distinguishable, from Drago's. Whether one's reputation is more sullied by a baseless charge of bouncing a check or a baseless charge of negligently causing a patient's death is at best conjectural. True, if convicted, Ms. Conway could be sentenced to three months in jail, Penal Law §70.15(2), and fined $500, Penal Law §80.05(2), but whether that is worse than paying $1,500,000 depends on the defendant's assets and fear of bankruptcy. The inconvenience of appearing in the Justice Court is not constitutionally different than the depositions, document requests, interrogatories, etc., of a baseless malpractice claim. Ms. Conway's expense of counsel was assuredly not greater than Drago's.

The state tort action has the potential to interfere with the filing of a just complaint. See City of Long Beach

v. Bozek, 31 Cal. 3d 527, 645 P. 2d 137, 183 Cal. Rptr. 86 (1982), vacated and remanded, 459 U.S. 1095 (1983)(because malicious prosecution discourages access to courts, municipality absolutely barred from bringing such a suit). Constitutionalizing the tort of malicious prosecution would only further deter cooperation with law enforcement personnel by the general population. "Law enforcement is ill served by this in terrorem restraint". Malley v. Briggs, __U.S.__, 89 L. Ed. 2d 671, 54 U.S.L.W. 4243, 4248 (5 Mar. 1986)(Powell, J., concurring in part and dissenting in part); cf. McCray v. Illinois, 386 U.S. 300, 310 (1967)(informer's privilege necessary to avoid retaliatory lawsuits).[27]

27. Actions for malicious prosecution are regarded by law with jealousy. Lord Holt said more than 200 years ago that they Cont'd.

"The study of the tort of malicious prosecution is properly the study of systems to defend the law from misuse." Note, "Groundless Litigations and The Malicious Prosecution Debate: A Historical Analysis," 88 Yale L.J. 1218 (1979). Granted that the misuse of litigation is a serious contemporary[28] problem, it nonetheless does not follow that the Constitution, rather than the common law, is the source of remedies.

'ought not be favored, but managed with great caution. Their tendency is to discourage prosecution for crime.'

Griswold v. Horne, 19 Ariz. 56, 165 P.318, 325 (1917); Accord, Street, "The Foundations of Legal Liability," 1980, at 326; Townsend, "A Treatise on the Wrongs called Slander and Libel Together with a Chapter on Malicious Prosecution," 700 (4th ed. 1890).

28. The deterrent of the very early common law, although arguably unconstitutional, was apparently effective: "Anglo-Saxon Courts employed a simple system for guarding against false suits: the complainant unfortunate enough to lose his cause also lost his tongue". Note, "Groundless Litigation," supra, 88 Yale L.J. at 1221.

POINT II

EVEN IF THE INTERESTED ASSERTED IS EITHER "LIBERTY" OR "PROPERTY" WITHIN THE MEANING OF THE FOURTEENTH AMENDMENT, THE DUE PROCESS CLAUSE GUARANTEES ONLY THAT THE STATE PROVIDE AN ADEQUATE AND EFFECTIVE TORT REMEDY WHENEVER A STATE ACTOR COMMITS A TORT

Even if the interest in freedom from unjustifiable litigation is either "liberty" or "property" within the meaning of the Due Process Clause, the existence of the common law tort remedy of malicious prosecution provides plaintiff the process which is due because her §1983 claim is merely a replica of the malicious prosecution claim. It is settled that acts which are illegal under state law stand on a different due process footing than acts which are in accordance with state law. Compare Parratt v. Taylor, 451 U.S. 527 (1981), with Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982). Parratt's focus on "the impracticality of providing any meaning-

ful pre-deprivation process", Parratt v. Taylor, 451 U.S. 527, 539 (footnote omitted), applies in any case in which state actors are committing acts tortious under state law.[29] The state cannot realistically "predict" when one of its agents will commit a tort forbidden by its own law. It cannot, therefore, command that tortfeasors shall give their victims notice and opportunity to be heard, which are the "touchstones" of due process, see Friendly, "Some Kind of Hearing", 123 U. Pa. L. Rev. 1267 (1975), before being subjected to tortious injury. Indeed, Lynn Conway had one to three phone calls with the police officer (JA147, 151-152, 214-220), and several with the Martabanos before her arrest. Her claim is not that her side of the events was not brought to the attention

29. Cloutier v. Town of Epping, 714 F. 2d 1184, 1190 (1st Cir. 1983).

of the defendants, but rather that, knowing that the bounced check was strictly a bank error, defendants filed a criminal charge anyway (JA36). Unless due process is a generalized guarantee that the state will never employ a tortfeasor, wrongful conduct such as Lynn Conway charges can only realistically be remedied by a damages action, and the state cannot in fact do more to protect its citizens than make such damages action available to compensate the injured and punish the wrongdoer. Cf. Davidson v. Cannon, __U.S.__, 106 S.Ct. 668, 88 L. Ed. 2d 677 (1986)(Blackmun, J., dissenting) ("[l]acking a meaningful post-deprivation remedy in state court, Davidson was deprived of his liberty without due process of law").

It is undecided whether the Parratt analysis applies to "liberty" as opposed to "property" interests, Parratt, supra,

451 U.S. 527, 545-46 (Blackmun, J., concurring). Ingraham v. Wright, 430 U.S. 651 (1977), in its context held that a "liberty" interest can appropriately be protected by a common law tort, and Lynn Conway's interest is just as capable of adequate common law protection. Indeed, her injury is less grevious and more capable of adequate money compensation than the wrongly battered school child which was the concern of the dissent. Ingraham, supra, 430 U.S. 651, 693-94 & n.11 ("tort action is utterly inadequate to protect against erroneous infliction of punishment"). Lynch v. Household Finance Corp., 405 U.S. 538 (1972), held that "the dichotomy between personal liberties and property rights is a false one". 405 U.S. at 552. "In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither

could have meaning without the other." Ibid.

> "The logic of Parratt permits no principled distinction between deprivations of property and liberty interests. If a deprivation results from a 'random and unauthorized' act by a state official, the State is no more able to predict the deprivation, and a pre-deprivation hearing is no more possible, when the deprivation involves a liberty interest than when it involves a property interest. Therefore, if plaintiff has an adequate post-deprivation remedy in state court, that should satisfy the requirements of due process and plaintiff should not be permitted to bring a §1983 claim in federal court."

Juncker v. Tinney, 549 F. Supp. 574, 576 (E.D. Md. 1982). Accord, Farrell v. Miklas, 605 F. Supp. 202 (E.D.N.Y. 1985).

CONCLUSION

The orders of the United States Court of Appeals for the Second Circuit should be reversed and remanded with instructions to dismiss respondent's complaint.

If the Court sustains the ruling below, it should vacate and remand to determine the undecided statute of limitations issue (A5-6) in light of Wilson v. Garcia, 471 U.S. __, 105 S.Ct. 1938, 85 L.Ed. 2d 254 (1985) and Gates v. Spinks, 771 F. 2d 916 (5th Cir. 1985) cert. den., __U.S.__, 54 U.S.L.W. 3598.[30]

30. New York, like Mississippi, has a one year period for "assault, battery, false arrest, malicious prosecution, libel, slander, and invasion of privacy" C.P.L.R. §215(3), and a residual three year period for other personal injuries. C.P.L.R. §214. If Gates were followed in the Second Circuit, this complaint would be dismissed as to all claims.

Alternatively, if the Court sustains the rulings below, it should vacate and remand as to co-petitioners BANO for a determination on the issue of whether they had an objectively reasonable belief as to the existence of probable cause based on the advise of counsel and the statutory presumption contained in Penal Law §190.10. Such relief is sought in reliance on Daniels v. Williams, __U.S.__, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986), Davidson v. Cannon, __U.S.__, 106 S. Ct. 668, 88 L. Ed. 2d 677 (1986), and Malley v. Briggs, __U.S.__, 89 L. Ed. 2d 271, 54 U.S.L.W. 4243 (March 5, 1986), which were decided after the filing of the certiorari petition.

New York, New York
11 April 19865

Respectfully submitted,

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Appendix

New York Criminal Procedure Law provides:

§120.20(2) Warrant of Arrest; when issuable

> Even though such accusatory instrument is sufficient on its face, the court may refuse to issue a warrant of arrest based thereon until it has further satisfied itself, by inquiry or examination of witnesses, that there is reasonable cause to believe that the defendant committed an offense charged. Upon such inquiry or examination the court may examine, under oath or otherwise, any available person whom it believes may possess knowledge concerning the subject matter of the charge.

§155.05 Larceny; defined

1. A person steals property and commits larceny when, with intent to deprive another of property or to appropriate the same to himself or to a third person, he wrongfully takes, obtains or withholds such property from an owner thereof.

2. Larceny includes a wrongful taking, obtaining or withholding of another's property, with the intent prescribed in subdivision one of this section, committed in any of the following ways:

(a) By conduct heretofore defined or known as common law larceny by trespassory taking, common law larceny by trick, embezzlement, or obtaining property by false pretenses;

* * *

(c) By committing the crime of issuing a bad check, as defined in section 190.05;
(d) By false promise.

§155.00 Larceny; definitions of terms

The following definitions are applicable to this title:

* * *

5. "Owner." When property is taken, obtained or withheld by one person from another person, an "owner" thereof means any person who has a right to possession thereof superior to that of the taker, obtainer of withholder.

A person who has obtained possession of property by theft or other illegal means shall be deemed to have a right of possession superior to that of a person who takes, obtains or withholds from him by larcenous means.

A joint or common owner of property shall not be deemed to have a right of possession thereto superior to that of any

other joint or common owner thereof.

In the absence of a specific agreement to the contrary, a person in lawful possession of property shall be deemed to have a right of possession superior to that of a person having only a security interest therein, even if legal title lies with the holder of the security interest pursuant to a conditional sale contract or other security agreement.

New York Penal Law 190.00(6) provides:

§190.00 Issuing a bad check; definitions of terms.

* * *

6. "Funds" means money or credit.

* * *

§190.05 Issuing a bad check

A person is guilty of issuing a bad check when:

1. (a) As a drawer or representative drawer, he utters a check knowing that he or his principal, as the case may be, does not then have sufficient funds with the drawee to cover it, and (b) he intends or believes at the time of utterance that payment will be refused by the drawee upon presenta-

tion, and (c) payment is refused by the drawee upon presentation; or

2. (a) He passes a check knowing that the drawer thereof does not then have sufficient funds with the drawee to cover it, and (b) he intends or believes at the time the check is passed that payment will be refused by the drawee upon presentation, and (c) payment is refused by the drawee upon presentation.

Issuing a bad check is a class B misdemeanor.

§190.10 Issuing a bad check; presumptions

1. When the drawer of a check has insufficient funds with the drawee to cover it at the time of utterance, the subscribing drawer or representative drawer, as the case may be is presumed to know of such insufficiency.

2. A subscribing drawer or representative drawer, as the case may be, of an ultimately dishonored check is presumed to have intended or believed that the check would be dishonored upon presentation when:

(a) The drawer had no account with the drawee at the time of utterance; or

(b)(i) The drawer had insufficient funds with the drawee at the time of utterance, and (ii) the check was presented to the drawee for payment not more than thirty days after the date of utterance, and (iii) the drawer had insufficient funds with the drawee at the time of presentation.

3. Dishonor of a check by the drawee and insufficiency of the drawer's funds at the time of presentation may properly be proved by introduction in evidence of a note of protest of the check, or of a certificate under oath of an authorized representative of the drawee declaring the dishonor and insufficiency, and such proof shall constitute presumptive evidence of such dishonor and insufficiency.

§190.15 Issuing a bad check; defenses.

In any prosecution for issuing a bad check, it is an affirmative defense that:

1. The defendant or a person acting in his behalf made full satisfaction of the amount of the check within ten days after dishonor by the drawee; or

* * *

RESPONDENT'S

BRIEF

Supreme Court, U.S.
FILED
JUN 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1947

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

VINCENT T. CERBONE, as Justice of the Village Court, Village of Mt. Kisco, New York,

Petitioner,

—and—

BANO BUICK, INC., ALFRED MARTABANO, and ALFRED V. MARTABANO,

Co-Petitioners,

—against—

LYNN H. CONWAY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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June 13, 1986

Petition for Writ of Certiorari filed June 12, 1985
Petition for Writ of Certiorari granted January 27, 1986

QUESTIONS PRESENTED

1. Does an action alleging deprivations, under color of state law, of constitutional rights, fail to state a claim under 42 U.S.C. Sec. 1983 because it also alleges a cause of action for malicious prosecution under state law?

2. Does an arrest pursuant to a fraudulently procured warrant, seven hours of detention and numerous appearances in court implicate a Fourteenth Amendment "liberty" interest?

3. Is the denial of an unbiased forum in a state criminal proceeding a sufficient constitutional deprivation for purposes of Section 1983?

4. Is a delay of over two years in offering a trial for a simple misdemeanor a deprivation of speedy trial rights

under the Sixth Amendment?

5. Is a state official's act in stripping (or attempting to strip) a party of a cause of action, without a hearing or other attribute of due process, a deprivation of procedural due process for purposes of Section 1983?

6. Are allegations that would be sufficient to state a cause of action for malicious prosecution under state law sufficient to state a deprivation for purposes of Section 1983?

PARTIES BELOW

The parties to the proceeding below were: Plaintiff/ Respondent Lynn Conway, Defendants/Petitioners Vincent Cerbone, Bano Buick, Inc., Alfred Martabano and Alfred V. Martabano, and Defendants Village of Mt. Kisco, and Detective Larry McKenzie (a/k/a McKinsey). The Village of Mt. Kisco and McKenzie are not parties herein.

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Johnson v. Mississippi, 403 U.S. 212 (1971) ---------- 49

Johnson v. United States, 333 U.S. 10 (1948) ---------- 49

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Fourteenth Amendment ---------- passim

Statutes

Federal Statutes

42 U.S.C. Sec 1983 ---------- passim

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N.Y. Crim.Proc.L. Sec. 1.20(17) - 57

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N.Y. Crim.Proc.L. Sec. 100.05 --- 57

N.Y. Judiciary L. Code of Judicial Conduct ---------- 49

N.Y. Penal L., Sec 190.05 ------- 11, 26, 55, 56

Other Authority

C.L. Dodgson (a/k/a Lewis Carroll), Alice's Adventures in Wonderland ---------- 48

JUDGMENTS AND OPINIONS BELOW

The opinions and orders of the United States Court of Appeals for the Second Circuit are reported officially at 758 F.2d 46 (1985) and 750 F.2d 205 (1984). They are reprinted in the Appendix to the Petition for Certiorari at A-1 through A-7 and A-8 through A-29.

The decisions and orders of the United States District Court for the Southern District of New York, from which the appeal was taken, have not been officially reported. They are reprinted in the Appendix to the Petition for Certiorari at A-30 through A-39 (March 15, 1983--Memorandum Opinion and Order) and A-40 through A-41 (January 17, 1983--Endorsement). The judgment of the District Court is reprinted at JA-47).

JURISDICTION

The orders of the Second Circuit sought to be reviewed here were entered on December 11, 1984 and March 15, 1985. No petition for rehearing was filed.

The petiton for a writ of certiorari was filed within 90 days of March 15, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. Scc. 1254(1). The petition was granted on January 27, 1986.

STATUTES INVOLVED

Section 1983 of Title 42 of the United States Code and the Fourteenth Amendment to the Constitution are reprinted in relevant part in the petition for certiorari at 2-3.

The Supremacy Clause (Const. Art VI, Cl.2) and the Fourth and Sixth Amendments to the Constitution are reprinted in the

appendix hereto at page I.

Section 190.05 of the New York Penal Law is reprinted at pages III - IV of petitioners' brief. Sections 1.20(17), 30.20, 30.30 and 100.05 of the New York Criminal Procedure Law are reprinted (in relevant part) at pages IJ - III of the appendix hereto and the relevant portions of the Code of Judicial Conduct, a part of the New York Judiciary Law are reprinted in footnote 14 at page 49.

STATEMENT OF THE CASE

Statement of Facts

This action arises out of the intentional misuse of state criminal proceedings in an attempt to force respondent Lynn Conway to pay a debt that, to be charitable, can only be described as questionable. Conway was arrested after she had stopped payment on a check she

had given for auto repairs. The repairs had been neither authorized nor properly performed. The Village Justice, petitioner Vincent Cerbone,[1] who decided virtually all aspects of the case, had several roles: He was the lawyer for the complaining witness/prosecutor, had counselled the bringing of the criminal action, and was the cousin of the complaining witness.[2]

While the facts in this matter are relatively trivial, they raise serious Constitutional issues. In this statement of facts, respondent, having opposed

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1 Cerbone was removed from the bench for misconduct. In re Cerbone, 61 N.Y.2d 93 (1984). Respondent will, however, follow the petitioners' practice of referring to him as "Justice Cerbone".

2 While the record does not show the kinship, Justice Cerbone's brother, James Cerbone, also a Village Justice for Mt. Kisco, recused himself because he was a cousin of the Martabanos (JA-55-56).

summary judgment below, will present the evidence in a light favorable to her position and draw favorable inferences. Such is her entitlement. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970); Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962); United States v. Diebold, Inc., 369 U.S. 654, 655 (1962).

The story begins when Lynn Conway's ("Conway") 1973 Opel automobile broke down near Mt. Kisco, New York. She was driving home from her job as an office manager (JA-199; 194). The car was towed to petitioner Bano Buick, Inc. ("Bano"), which had worked on the car before (JA-278). Bano is owned and managed by petitioner Alfred Martabano and petitioner Alfred V. Martabano, father and son, president and vice-president of the company (JA-80-81).

Lynn Conway and her husband, Jeffrey, asked Bano to tell them what repairs would be necessary and to give an estimate. Bano told them that the car would need a new engine. The Conways said not to do anything without their authorization (JA-204; 282; 284; 288).

While Bano was looking for a used Opel engine, Jeffrey Conway (a real estate salesman), also looked on his travels through Westchester County (JA-282-282). Bano was aware that he was doing this and encouraged his efforts (JA-283).

On May 9, Jeffrey Conway called Bano to say that he had found a suitable engine (JA-283; 285). He was told that the car had already been repaired and was ready to be picked up. When the Conways arrived at Bano that evening, they recognized the replacement engine as one that

they had rejected (JA-284-285). It had come from Bedford Auto Wreckers, of which Tom Martabano (presumably related) was an owner (JA-98).

The Conways protested that the repair had been done without authorization and requested that the engine that Jeffrey Conway had found be installed. The manager said that Bano would be willing to do that, but they would have to pay to have the present engine removed and the new one installed. Also, they would have to pay storage charges and no date could be given for the installation (JA-209; 290). The manager assured them that the engine was good (JA-361), although he admitted that he did not know its provenance; the Martabano relative who had made the purchase was on his way back to college and could not be reached (JA-289).

In any event, the Conways were told that they could not have the car without paying the $431.34 bill. Feeling that she had no choice and "hop[ing] that the engine would run," Conway wrote a check for the amount claimed (JA-296; 26). She did not intend to stop payment at the time (JA-246) and had money in the account to cover the check (JA-36).

The car started dying as soon as it left the garage (JA- 210; 303). Jeffrey, who was driving it, limped it home (where it remained until they could find a buyer (JA-306-307)). A neighbor helped inspect the car; the Conways concluded that it was worse than when they first took it to Bano (JA-303). They decided to stop payment on the check because "the work was not done properly. It was a faulty engine put in my car." (JA-202).

The next morning Conway went to her

bank, Dry Dock Savings Bank, to stop payment on the check (JA-40). Bano deposited the check and, as could be expected, it did not clear. Bano's bank, Bankers Trust Company, returned the check with an advice saying that the return was for "Insufficient [funds]" (JA-27),[3] notwithstanding that the check had "payment stopped" stamped on it. As was its practice, Bano redeposited the check (JA-93). It was again returned. This time, however, the advice bore the proper reason, namely "Payment stopped" (JA-94).

Jeffrey Conway called Bano on May 11, the day after he picked up the car, to complain (JA-342). Later, he met with Alfred Martabano to discuss resolution of

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3 The record is not clear whether Justice Cerbone's bank or Conway's erred in stating that there were insufficient funds. In any event, Dry Dock prepared the letter at JA-41 when Bano was threatening Conway with arrest.

the bill, but got nowhere (JA-298-301). Lynn Conway also talked to Bano's officers, making it clear that the check did not bounce; she had stopped payment (JA-212; A-13).

The Martabanos decided to consult their cousin and attorney, petitoner Vincent Cerbone, to decide what to do next. Cerbone was also a Village Justice for the Village of Mt. Kisco. They told Cerbone the "whole story" (JA-105), showing him the bank advice indicating stop payment (A-13; JA-105; 126).

Cerbone, knowing that the check had been returned because of the stop payment order, nevertheless counselled his cousins to go to the police department and "they would handle it" since it was a criminal matter (JA-127). Cerbone said that the second advice, the one showing a stop payment, had nothing to do with the

matter (JA-126), hinting broadly that it should not even be shown to the police.

Clearly, Justice Cerbone, as he counselled his cousins, knew that the check was not a bad check under N.Y. Penal L. Sec. 190.05, et seg. Under the statute, a bad check is defined as a check that is issued where the drawer knows that he "does not have sufficient funds to cover it and (b) he intends or believes at the time of utterance that payment will be refused by the drawee upon presentation." Thus, knowing of the stop payment and that Section 190.05 should not apply, Cerbone nevertheless advised use of the criminal process to collect the claimed debt.

As he had been told, Alfred V. Martabano (the son) went to the Mt. Kisco Police Department and spoke with Detec-

tive Larry McKenzie (JA-127). The younger Martabano carefully withheld the "Payment stopped" advice from McKenzie. Apparently following the Village's practice, McKenzie asked Martabano to wait a few days, so he could make a few phone calls (JA-214).

McKenzie called Ms. Conway at 11:00 that night (JA-207-208; 214; 312). As Lynn Conway testified:

> He said that I owed them [Bano] money for engine repairs, and that this, was -- these papers were instituting an arrest, and if I would go down and pay the bill, he wouldn't complete the papers and there wouldn't be any arrest.
>
> MR. STIX: What did you say to him?
>
> THE WITNESS: I told him that there was no matter of me paying the bill, because there was a stop payment on this, there was not insufficient funds.
>
> Q What did he say to you?
>
> A He just told me if I went down and paid the bill, I wouldn't be

> arrested. If not, I would.

(JA-215). McKenzie called the following evening, again at around 11:00 P.M. (JA-219-220). "He asked me if I had gone to Bano and settled the matter." (JA-220) Conway said "no" and hung up (JA-220).

The next day, June 30, 1977, McKenzie called Bano to say that the Conways "weren't going to take care of the matter and they could do whatever they wanted" (JA-153). The younger Martabano signed the Accusatory Instrument (JA-61); McKenzie typed up the arrest warrant (JA-157) and had it signed by Acting Village Justice Martin Bender (JA-63; 158).

McKenzie made arrangements with the State Police (JA-159-160), and proceeded to the Conway residence to make the arrest. He arrived around 7:00 P.M. He handcuffed Ms. Conway, put her into the police car and took her to the Mt. Kisco

Police Station (JA-222-224). Ms. Conway tried to show the letter from Dry Dock to McKenzie. He just brushed it aside, saying "it means nothing. I have a warrant for your arrest." (JA-271). Jeffrey Conway was not allowed to ride in the police car with his wife. He followed behind in the car that Bano had not worked on.

They arrived at the Mt. Kisco Police Station where Ms. Conway was booked and turned over to the matron for a pat down search. (JA-166, 226). Jeffrey Conway described her as "crying more than talking." (JA-320). Ms. Conway was held at the police station until around 1:30 in the morning. During this period she was not allowed to use the ladies room. Instead she had to use the toilet in an open cell (JA-257). Finally, she was arraigned before Justice Bender around

1:30 in the morning (A-14; JA-229; 321). She was released on her own recognizance and ordered to return in two weeks.

The prosecution was conducted in accordance with the village custom of private prosecutions. In bad check cases, at least, where the amount involved is less than for a felony, the complaining witness prosecutes. (JA-35-36; 54-55) In this case, apparently, it was Alfred V. Martabano, and, later, Charles Martabano, Alfred Martabano's nephew. The clerk's docket sheet reflects the active prosecution by the Martabanos. For example, the entry for 7/7/81 notes that "Mr. Martabano also apeared [sic];" for 3/23/78, "Alfred Martabano, Jr. [sic] appeared;" for 8/30/79, "Matter adjourned to 9/6/79 so that Charles Martabano could be present." (JA-49-51).

Over the nearly two and a half years that the charges were pending against her, Lynn Conway was forced to make repeated trips to Mt. Kisco, about a forty-five minute drive each way. The docket sheet notes her presence on at least nine occasions (JA-49-51).

Although he claimed to have recused himself, Justice Cerbone repeatedly had the case before him and, not surprisingly, he agreed with the positions of his clients, who were prosecuting. For example: Lynn Conway was arrested and arraigned on June 30, 1977. She entered her plea on August 4, 1977 (the record is unclear as to who is to be charged with the delay). On February 1, 1978, one hundred and eighty days after entering her plea, Stix made a motion to dismiss on speedy trial grounds. Justice

Cerbone denied the motion on March 7, and set the matter down for trial on March 23. On March 23, Justice Bender was sitting. Mr Stix renewed the motion and Justice Bender, presumably relying on Cerbone's decision of two weeks before, denied the motion. Stix counselled an appeal, which was taken.

Finally the District Attorney's office made an appearance. The clerk's docket entry for 8/30/79 shows:

> Jim Egan ADA appeared in court before Judge J. Cerbone [Joseph Cerbone, Vincent Cerbone's brother] and made a motion to withdraw the charge pending against Miss Conway.
>
> (1) Time period that has passed and (sic) makes it extremely difficult to prepare for any kind of case.
>
> Motion was denied.
>
> Matter adjourned to 9/6/79 -- so that Charles Martabano could be present.

(JA-51).

On 9/20/79 Lynn Farrell, another Assistant District Attorney, appeared and again moved to withdraw the charge. Justice Vincent Cerbone was sitting at the time. As Stix, who was present, described the scene:

> Judge Cerbone became irate upon the news that the District Attorney would not prosecute Lynn Conway. Judge Cerbone's reaction which he shouted throughout the crowded courtroom was "You will continue to prosecute this case; you will try it; and you will get a conviction."

(JA-58). Ultimately, Cerbone relented and granted the People's motion. The docket entry reads:

> People moved to withdraw the charge (Lynn Farrell ADA) due to the period of time that has elapsed (not on the merits).

(JA-51). The final parenthetical, of course, was Cerbone's attempt to strip away Mrs. Conway's cause of action for malicious prosecution.

Justice Cerbone's rationalization for not complying with his purported decision to recuse himself, was simple: he stated that "at the time, I was the only available town justice." (JA-51). Thus, the charges could have remained pending against Mrs. Conway for years -- until Cerbone failed to be reelected to the bench or was removed therefrom -- hardly a good measuring rod for speedy trial purposes. Further, the case did come before two other Justices, one of whom, Justice Bender, appears to have been impartial. Finally, the case could have been transferred to another jurisdiction (JA-51).

As a result of the arrest and living for years under the threats of jail and a clearly biased criminal justice system, Mrs. Conway became depressed and emotionally upset (JA-249-250). She was

treated by a psychotherapist (JA-195) and was frequently unable to work (JA-195; 323). She suffered with the fear "that another policeman from Mount Kisco might be there taking someone else away. It made me feel more than insecure, more than unhappy, mentally, physically and sexually" (JA-328-219).

Proceedings Below

Ms. Conway, represented at the time by Wayne Stix, brought an action in New York Supreme Court against the Village of Mt. Kisco, Detective McKenzie, Bano Buick and the Martabanos. Vincent Cerbone was not a defendant. The action was commenced on January 15, 1980 (A-31). It was dismissed as against the Village for improper service of process and as against McKenzie on what the Second Circuit referred to as the "dubious ground that McKinsey [sic], a member of the Mt.

Kisco police department, was entitled to quasi-judicial immunity." (A-23).

On June 7, 1982, while the remainder of the state action was pending, Ms. Conway, again represented by Stix, filed the instant action in the United States District Court for the Southern District of New York, alleging claims sounding in false arrest and malicious prosecution under Sections 1983 and 1985 of Title 42 of the United States Code. She alleged substantive violations of the Fourth, Sixth and Fourteenth Amendments to the Constitution. The defendants in the federal action were the same as those in the state action, with the addition of Vincent Cerbone. The factual background was the same as that in the state action.

Justice Cerbone moved for judgment on the pleadings, pursuant to Fed.R.Civ.

P. 12(c), on the ground that as a judge, he was entitled to an absolute judicial immunity. The District Court granted that motion on January 17, 1983 (A-40-41).

The Village and McKenzie moved to dismiss pursuant to Rule 12(c) and Bano Buick and the Martabanos moved to dismiss pursuant to Rule 12(b)(6). The District Court, accepting affidavits, decided the matter under Rule 56 (Summary Judgment) and, on March 14, rendered an opinion and order dismissing the action (A-30). Judgment dismissing the action was filed on March 25, 1983 (JA-2).

On the strength of the District Court's decision, the remaining defendants in the state action moved to dismiss on the ground of res judicata. That motion was granted; no appeal was taken.

Conway filed a timely notice of appeal to the United States Court of Appeals for the Second Circuit on April 21, 1983. After her attorney, Wayne Stix, had failed timely to perfect the appeal, Ms. Conway discharged him and proceeded pro se.

The Second Circuit, in opinions dated December 11, 1984 (A-8) and March 15, 1985 (A-1)[4] affirmed in part and reversed in part. In particular, it affirmed the dismissal of the Village on the ground that no custom or policy had been alleged, as required by Owen v. City

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4 Cerbone adopted the position that he was not a proper appellee because of defects in the notice of appeal. Consequently, he did not submit a brief to the Second Circuit when the matter was first heard. The Court gave him leave to brief his position before the mandate of the Court would be effective as to him. The second opinion considered the arguments that Cerbone raised.

of Independence, 445 U.S. 622 (1980) and Monell v. Department of Social Services, 436 U.S. 658 (1978). It also affirmed the dismissal of McKenzie; dismissal in the state action was res judicata herein. Finally, it affirmed the dismissal of the false arrest cause of action because the statute of limitations had run.

The Second Circuit, however, reversed as to Bano Buick, the Martabanos and Justice Cerbone (in his individual capacity) and remanded the cause. The Second Circuit concluded, insofar as relevant herein, that Ms. Conway had alleged a cause of action under Section 1983. In particular, she had properly alleged the tort of malicious prosecution and that as a result of the tortious conduct, she had been deprived of "rights, privileges and immunities secured by the Constitution and laws."

Without making an exhaustive catalogue of the rights violated, all that was necessary was one, the Second Circuit concluded that she had sustained a liberty deprivation by reason of the arrest and seven hours detention and, as a result, she suffered "'great humiliation, ridicule, and mental anguish' [which] resulted from Cerbone's conspiracy with the Village, Bano Buick and the Martabanos to execute the arrest warrant." (A-4).

SUMMARY OF ARGUMENT

Petitioners artfully misconstrue Conway's positions and the Second Circuit's opinions. They set up straw men that, not surprisingly, fall. In particular, they confuse the rights violated by their conduct with the injuries that she sustained as a result. They ignore

the violations of substantive rights and vainly argue that "great humiliation, ridicule and mental anguish" (A-4) is akin to injury to reputation and is not compensable in an action under 42 U.S.C. Sec. 1983.

In addition to having engaged in conduct that amounted to malicious prosecution, the petitioners also violated substantive federal rights, privileges and immunities. In particular they violated Conway's liberty and due process rights by having her arrested and brought before Justice Cerbone's "kangaroo court." Cerbone, knowing that Conway had not violated N.Y. Penal L. Sec. 190.05, ("Issuing a bad check", a misdemeanor), counselled the complaining witness to sign the accusatory instrument and then sat in judgment as his cousin/client prosecuted Conway. He shouted at the

Assistant District Attorney, when her office had entered the picture, telling her to prosecute and get a conviction. He denied Conway's speedy trial motion, and let the charges remain pending for over two years. He appended "(not on the merits)" to the docket sheet in a transparent attempt to avoid liability for his misconduct.

Section 1983 provides redress for deprivations (under color of state law) of rights, privileges and immunities secured by the United States Constitution and laws. The availability of state proceedings to redress deprivations of state-created rights cannot oust the operation of Section 1983 to redress the deprivation of federally created rights.

The availability of adequate state proceedings is relevant only in determining procedural due process claims.

Such claims relate to the deprivation of state-created interests without meeting federal due process standards. Here, however, substantive federal rights are involved. Thus, a cause of action will lie under Section 1983, even though a parallel action might lie in state courts to vindicate state-created rights.

The tort of malicious prosecution provides the Court with guidance in determining whether there was a deprivation. The state law, however, does not control on that issue.

ARGUMENT

POINT I

PETITIONERS' CONDUCT VIOLATED SUBSTANTIAL FEDERALLY CREATED RIGHTS OF THE PLAINTIFF.

The federal system, by its very nature, depends on the sovereignty of

both the states and the federal government. Each sovereign creates rights, privileges and immunities for its citizens. The states have unlimited power to create (or decline to create) rights, so long as they do not run afoul of the Constitution. The federal government is limited to the powers ceded to it in the Constitution. Lynn Conway, as a citizen of the State of New York and of the United States, enjoys rights created by each sovereign.

Section 1983, 42 U.S.C. Sec 1983, by its terms, redresses deprivations of federal "rights, privileges and immunities," where those deprivations occur "under color of" state law. Section 1983 does not provide a vehicle for redressing violations of state-created rights.

Justice Stevens has succinctly cata-

logued the three types of federal rights protected by the Due Process Clause of the Fourteenth Amendment and enforced by Section 1983.

> First, it incorporates specific protections defined in the Bill of Rights.... Second, it contains a substantive component, sometimes referred to as "substantive due process," which bars certain arbitrary government actions "regardless of the fairness of the procedures used to implement them."... Third, it is a guarantee of fair procedure, sometimes referred to as "procedural due process."

Daniels v. Williams, No. 84-5872, 54 U.S.L.W. 4090, 4093 (January 21, 1986) (Concurring opinion).[5]

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5 Daniels and, its companion case, Davidson v. Cannon, No. 84-6470 (January 21, 1986), cite to the major cases relied upon by the Petitioners and the Government: Parratt v. Taylor, 451 U.S. 527 (1981) and Hudson v. Palmer, No. 82-1630 (July 3, 1984). Daniels and Davidson are decided not on the issue of rights implicated, but rather on the issue of what constitutes a "deprivation" for purposes of Section 1983. In particular, the cases hold that negligence is not enough for a violation of Section 1983.

To assess Section 1983's application, the constitutional claims being advanced must be precisely delineated. To do so, several inquiries are necessary. The first inquiry relates to substantive rights and asks whether any substantive federal rights are involved. The second inquiry is a substantive due process inquiry: Was there some arbitrary state conduct that is unlawful, regardless of the procedures available for redress? The third area is a procedural due process inquiry and it has two parts: Were any state-created rights violated? If so, were the state or other procedures available to redress those violations adequate under the Due Process Clause of the Fourteenth Amendment.[6] See

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6 In essence, procedural due process federalizes a lack of adequate procedures to redress deprivations of state created rights. "In a procedural due process (cont'd)

also, e.g., Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982); Baker v. McCollan, 443 U.S. 137,140 (1979).

Only if a violation of some federal right is found can the further level of inquiry be made: What injuries did the plaintiff sustain as a result of the violation? The inquiry as to injury can be made only after a deprivation has been found. Even if there is no compensable injury, nominal damages are appropriate. Cary v. Piphus, 435 U.S. 247 (1978); see Monroe v. Pape, 365 U.S. 167, 179-180 (1961).

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claim, it is not the deprivation of property or liberty that is unconstitutional; it is the deprivation of property or liberty without due process of law - without adequate procedures." Daniels, supra, 54 U.S.L.W. at 4093 (emphasis in original)

Here, petitioners fail to distinguish the two levels of inquiry. They avoid an analysis of the federal rights involved and, relying on Paul v. Davis, 424 U.S. 693 (1976), launch a discussion of Ms. Conway's injuries. Petitioners and the United States (as amicus curiae) conclude that her injuries are akin to injuries to reputation, the matter at issue in Paul, and, thus, there is no cause of action under Section 1983. (Br. at 30-36; U.S. Br. at 12-14).

Paul, however, does not lead where the petitioners and the United States would like. Paul does not concern itself with an inquiry about injury. Instead, it asks whether reputation, alone, is a federal "right, privilege or immunity" protected as a liberty interest under the Fourteenth Amendment. Justice Rehnquist clearly distinguished the inquiry as to

rights from that as to injury:

> It is apparent from our decisions that there exists a variety of interests which are difficult of definition but are nevertheless comprehended within the meaning of either "liberty" or "property" as meant in the Due Process Clause. These interests attain this constitutional status by virtue of the fact that they have been initially recognized and protected by state law,[5] and we have repeatedly ruled that the procedural guarantees of the Fourteenth Amendment apply whenever the State seeks to remove or significantly alter that protected status.

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5 There are other interests, of course, protected not by virtue of their recognition by the law of a particular State but because they are guaranteed in one of the substantive provisions of the Bill of Rights which have been "incorporated" into the Fourteenth Amendment, Section 1983 makes a deprivation of such rights actionable independently of state law....

424 U.S. at 710-711. See Monroe, 365 U.S. at 173-174.

The plaintiff in Paul claimed an injury to his reputation as the result of his mugshot being included in a flyer of "Active Shoplifters." He was unable to show the deprivation of any recognized federal right and, thus, sought to imply a new right, a right to an unbesmirched reputation, to stay in federal court. He claimed reputation as a Fourteenth Amendment "liberty" interest and thus a constitutionally protected "right, privilege or immunity" for purposes of Section 1983. 424 U.S. at 701, 712. The Court disagreed.[7] Since there was no depri-

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7 A different holding in Paul would likely obtain if the plaintiff had shown that that the injuries were to punish him, say, for exercising his First Amendment rights. In that event, the injury to reputation is the means by which the deprivation is done, as well as the injury suffered. Reputation would not, however, be the "right, privilege or immunity" violated. See Perry v. Sinderman, 408 U.S. 593 (1972) (Deprivation of state property interest in retaliation for exercise of First Amendment rights held actionable under Section 1983).

vation of a federal right, although there was a colorable deprivation of a state right, the Court then turned to the possibility of a procedural due process violation. The Court found adequate the procedures for redress. As a result, no Section 1983 claim would lie.

Paul highlights the need to distinguish rights from injury. Other decisions have followed the type of analysis used in Paul, including the decisions relied on by petitioners and by the government: Parratt v. Taylor, 451 U.S. 527 (1981); Hudson v. Palmer, No. 82-1630 (July 3, 1984) and Ingraham v. Wright, 430 U.S. 651 (1977). In each, inquiry was first made as to whether a federal right was involved. In Parratt and Hudson, the Court held that the interests involved were state-created property interests and thus not federal rights.

While there were no pre-deprivation procedures available, a usual due process requirement, such would not be feasible in cases of unforseen negligence or malicious conduct. The post deprivation procedures, however, were found to be adequate and, thus, no federal right was implicated.[8]

Ingraham differs from Parratt and Hudson in that it relates to a liberty interest, namely, whether a student had a constitutional right to be free from

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8 Parratt and Hudson may also be distinguished on the further ground that both are prisoner cases and their due process rights are less stringent because of the "nature of the regime to which they have lawfully been committed." Wolff v. McDonnell, 418 U.S. 539, 556 (1974); e.g., Cruz v. Beto, 405 U.S. 319 (1972); Pell v. Procunier, 417 U.S. 817, 822 (1972); Hudson, supra. Additionally, Parratt and Hudson involve property deprivations, which generally can be adequadely redressed by an award of monetary damages. That is not the case with liberty deprivations. E.g. Ingraham, 430 U.S. at 701 (STEVENS, J., dissenting); Parratt 451 U.S. at 540.

being summarily paddled at public school. However, the Court employs the same mode of analysis: It first looks for a violation of substantive federal rights and, finding none, then turns to a procedural due process inquiry. The Court held that paddling impinged a state protected liberty interest and due process trappings would be required. 430 U.S. at 674. However, the common law privilege that schools have long enjoyed excused the lack of procedural formalities. 430 U.S. at 675-680. Thus, Ingraham would not support the argument of Petitioners and the Government that the holding of Parratt and Hudson should extend to deprivations of "liberty" interests. (Br. at 45-46; U.S. Br. at 24-26).

Here, Conway, in contrast to the plaintiffs in Paul, Parratt, Hudson and Ingraham, alleges the violation of well-

recognized federal rights. She does not ask this Court to imply a new "right, privilege or immunity"; she does not need to. Petitioners ran roughshod over established federal rights: Freedom from unlawful arrest, a right to an unbiased forum, a right to a speedy trial, a right to her property interest in a cause of action. All this arose in petitioners' attempt to extort money from the plaintiff on a dubious criminal charge.[9]

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9 While Ms. Conway's federal rights may have state analogs, there is no requirement for her to seek redress under state laws before bringing an action under Section 1983. That argument was raised and soundly rejected in Monroe 365 U.S. at 183 ("The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."). See also McNeese v. Board of Education, 373 U.S. 668, 672 (1963).

POINT II

PETITIONERS VIOLATED CONWAY'S RIGHTS TO AN IMPARTIAL FORUM, TO FREEDOM FROM ARREST, TO A SPEEDY TRIAL AND TO ASSERT CAUSES OF ACTION FOR MALICIOUS PROSECUTION AND ABUSE OF PROCESS.

Petitoners destroyed some of the most cherished rights enjoyed by citizens of the United States. They deprived Conway of her liberty by arresting her on charges they knew were false. They forced her to defend herself in a "kangaroo" court, devoid of even a pretense of impartiality. They violated her federal (and state) rights to a speedy trial and they blocked her access to the state courts to seek redress for malicious prosecution and abuse of process. All this they did to try to force her to pay a questionable debt.

A. Lynn Conway was deprived of her federally protected liberty interests by her arrest and detention.

Lynn Conway's personal liberty is protected by the Fourth and Fourteenth Amendments.

> No right is more sacred, or is more carefully guarded by the common law than the right of every individual to the possession and control of his own person, free from all restraints or interferences of others, unless by clear and unquestionable authority of law.

Union Pacific Railway Co. v. Botsford, 141 U.S. 250,251 (1891). See Terry v. Ohio, 392 U.S.1 (1968).

The petitioners ran roughshod over Conway's rights. She was arrested. She was handcuffed and forced into a police car. She was taken from her home to the Mt. Kisco police station where she was booked and subjected to a pat-down search. She was held for over seven

hours, until 1:30 in the morning, when she was finally arraigned. She was not allowed to use the ladies' room; instead she had to use the toilet in an open cell. She was later required to appear in court on at least nine separate occasions (the court being about a forty-five minute drive from her home).[10] In short, Lynn Conway was deprived of her liberty.

The petitioners and the United States understandably seek to get as far from the arrest as possible. The United States goes so far as to misstate the law

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10 The United States makes the disingenuous statement that "[r]espondent makes no claim that she was forced to appear at trial or otherwise to participate in judicial proceedings." (U.S. Br. at 11). That statement is simply wrong. If Lynn Conway failed to appear on the adjourned dates, a bench warrant for her arrest would likely have issued, with the possibility of her physical detention until the time of trial or the imposition of substantial bail (See JA-50).

of New York. It argues:

> The court of appeals found that respondent had adequately asserted a deprivation of liberty by alleging that "seven hours of detention and 'great humiliation, ridicule and mental anguish' resulted from [the] conspiracy * * * to execute the arrest warrant" (Pet. App. A4). In so ruling, however, the court disregarded its earlier, unchallenged holding that respondent's claims for false arrest and imprisonment were time-barred, because those events had occurred more than three years prior to the initiation of her federal action. Thus, the claims growing out of the execution of the warrant and respondent's subsequent detention--which in other circumstances might well implicate both Fourteenth Amendment liberty concerns and substantive Fourth Amendment interests--have dropped out of the case.

(U.S. Br. at 11).

New York law has been clear for more than a century that the tort of malicious prosecution awards damages for all injuries sustained as a result of the prosecution. The compensable injuries include those which flow from execution

of an arrest warrant. Sheldon v. Carpenter, 4 N.Y. 579, 580 (1851) ("In an action for malicious prosecution, the plaintiff is entitled to recover damages not only for his unlawful arrest and imprisonment, and for the expenses of his defence, but for the injury to his fame and character by reason of the false accusation."). Accord, e.g., Burlett v. County of Saratoga, 111 A.D.2d 426, 427 (3rd Dep't 1985); Loeb v. Teitelbaum, 77 A.D.2d 92, 104-105 (1980), modif. on other grounds, 80 A.D. 2d 838 (2d Dep't 1981); Vina v. City of New York, 104 Misc.2d 958, 961 (Sup Ct., N.Y. County 1980). A cause of action for false arrest arises when the detention or imprisonment terminates. Warren v. Byrne, 699 F.2d 95, 97 (2d Cir. 1983). Conway's cause of action for false arrest arose on June 30, 1977 and was barred by the time

she commenced this action (A-22). In contrast, a cause of action for malicious prosecution does not arise until the criminal proceeding has terminated favorably to the defendant. E.g., Singleton v. City of New York, 632 F.2d 185 (2d Cir. 1980), cert. denied, 450 U.S. 920 (1981). Thus the statute of limitations on the wrongful conduct included in the malicious prosecution did not begin tc run until the dismissal of charges on September 20, 1979. Vina, 104 Misc.2d at 961.

Even under the most restrictive of definitions, detention pursuant to a fraudulently procured arrest warrant constitutes a deprivation of liberty under the Fourteenth Amendment. The brief of the United States, page 13, suggests that its position might well be different if the arrest were in the picture. Since

the arrest is a part of the malicious prosecution action, respondent accepts the government's support.

The freedom from arrest and detention based on a fraudulent criminal complaint is a substantive federal right (as well as a state-protected right). The arrest, procured by the conspiracy between a judge of the issuing court, his clients/cousins, and the village police, for the ulterior purpose of forcing payment of a questionable debt, clearly violated Lynn Conway's liberty interests.

B. Petitioners violated Lynn Conway's right to be tried by an impartial forum.

One of the essential ingredients of due process is the right to be tried by an impartial forum. Justice Cerbone's courtroom was anything but impartial. Cerbone had counselled his clients/cou-

sins, the Martabanos, to swear out the criminal complaint. He sat in judgment as his clients, rather than the District Attorney, prosecuted the case.

Although he claims to have recused himself from this matter on August 4, 1977,[11] Justice Cerbone made all decisions thereafter. On March 7, 1978 he denied Ms. Conway's motion to dismiss for lack of a speedy trial. On September 20, 1979 he reluctantly granted the prosecution's motion to dismiss, after shouting from the bench: "You will continue to prosecute this case; you will try it; and you will get a conviction!"

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11 The basis for Justice Cerbone's recusal was "that on prior occasions he had represented Bano Buick Inc. (JA-65). No mention was made that he had in fact counselled the owners of Bano Buick to file the accusatory instrument that was the genesis of that action. Likewise, Cerbone failed to mention that he was a cousin of the Martabanos.

(JA-58). In dismissing, Cerbone added "(not on the merits)" to the foot of the docket sheet. Obviously, Cerbone knew that his conduct was reprehensible and he sought to preclude an action for abuse of process and malicious prosecution.[12] Cerbone's conduct suggests the standard for due process in the tale of "Fury and the Mouse". C.L. Dodgson (a/k/a Lewis Carroll), Alice's Adventures in Wonderland, pp. 26-27, (Grosset & Dunlap, N.Y. 1935).[13]

This Court has repeatedly held that

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12 See pages 58 through 61, infra.

13 "Fury said to a mouse, That he met in the house, 'Let us both go to law: I will prosecute you, Come, I'll take no denial; we must have a trial: For really this morning I've nothing to do.' Said the mouse to the cur, 'Such a trial, dear sir, with no jury or judge, would be wasting our breath.' 'I'll be judge, I'll be jury.' Said cunning old Fury, 'I'll try the whole cause and condemn you to death.'"

"due process demands impartiality on the part of those who function in judicial or quasi-judicial capacities." Schweiker v. McClure, 456 U.S. 188, 195 (1982). Accord, e.g., Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980); Gerstein v. Pugh, 420 U.S. 103, 112-113 (1975); Johnson v. Mississippi, 403 U.S. 212 (1971); Witherspoon v. Illinois, 391 U.S. 510 (1968); In re Murchison, 349 U.S. 133 (1955); Johnson v. United States, 333 U.S. 10, 13-14 (1948).[14]

Cerbone's partiality violated Conway's substantive due process rights. Justice Stevens, concurring in Daniels,

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14 Cerbone's conduct can hardly be denominated consistent with the Canons 2 and 3 of the Canons of Judicial Conduct ("A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities" and "A Judge Should perform the Duties of His Office Impartially and Diligently"). N.Y. Judiciary L., Code of Judicial Conduct (McKinney's).

supra, 54 U.S.L.W. at 4093, articulates a test to distinguish procedural and substantive due process violations. The test is whether the acts conduct complained of are of a type that a state is prohibited from taking "regardless of the fairness of the procedures used to implement them."

Applying that test here, the inquiry becomes: Can the State force Conway to trial before a biased forum? The answer must clearly be "no". She would be precluded from virtually all forms of redress. Judicial immunity would block any tort action against the judge. Appellate reversal is also unlikely due to the deference given to findings of a trial court (after the party would have been forced to the expense of an appeal).[15]

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15 If a criminal defendant becomes (cont'd)

The absence of effective redress (either pre- or post- deprivation) shows that the right to an impartial forum is a substantive due process right.

C. Respondents violated Lynn Conway's rights to a speedy trial.

The right to a speedy trial is guaranteed by both the Sixth Amendment to the United States Constitution and two provisions of the New York Criminal Procedure Law, namely, Sections 30.20 and 30.30. The Sixth Amendment guarantee of a speedy trial is a "fundamental" right under the Constitiution. Barker v. Wingo, 407 U.S. 514, 515 (1972). See Smith

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aware of the Court's bias, he may well decide to play it safe and accept a plea bargain or, in New York practice, an adjournment in contemplation of dismissal. Either would preclude an action for malicious prosecution due to the lack of an essential element: a favorable termination on the merits. See Point IV, infra.

v. Hooey, 393 U.S. 374, 374-375 (1969); Klopfer v. North Carolina, 386 U.S. 213, 223 (1967).

Here, Lynn Conway was arrested and arraigned on June 30, 1977; the accusatory instrument was filed on that date. The docket sheet indicates various adjournments prior to Ms. Conway's entering her plea on August 4, 1977, but does not specify whether the adjournments were to be charged to Lynn Conway or the People.

Even using the arraignment date as the commencement of the speedy trial period, 180 days elapsed before the next event, the filing of a motion to dismiss under New York's speedy trial provisions on February 1, 1978 (215 days after the arrest and arraignment). Justice Cerbone denied that motion on March 7, 1978 and set the matter down for trial on March 23 (266 days after the arrest and arraign-

ment). It was not until September 20, 1979, two years and 82 days after the arrest and arraignment that the matter was finally dismissed.[16]

> The speedy trial
>
> guarantee is an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself.

United States v. Ewell, 383 U.S. 116 (1966). See Klopfer, supra, at 222. Such "emotional stress... can be presumed to result in the ordinary person from uncertainties in the prospect of facing public trial." Strunk v. United States, 412 U.S. 434, 439 (1973). Conway suf-

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16 A part of that delay, however, is attributable to the appeal taken from the March 7, 1977 order.

fered "emotional stress", (or "great humiliation, ridicule and mental anguish" (A-4)) as a part of her injury.

The Sixth Amendment guarantee is made applicable to the individual States through the Fourteenth Amendment. E.g., Klopfer, supra, 386 U.S. at 222; Smith, supra 393 U.S. at 374-375; Barker, supra, 407 U.S. at page 523. While the States are free to set their own time periods, they must comply with the guarantees of the Sixth Amendment. Barker, supra, 407 U.S. at p. 523.

The period required before running afoul of the speedy trial requirements is necessarily flexible; this Court has not set a "specified number of days or months" within which a criminal defendant must be afforded a trial. Barker, supra, 407 U.S. at 523. Various factors will determine when the speedy trial right

will be violated. Those factors include the complexity of the case. Barker, 407 U.S. at 531.

There were no factors that would justify the delay in bringing Conway to trial. She was charged with a single count of issuing a bad check. The factual issues were simple: Did Lynn Conway write a check knowing that she did not have sufficient funds on deposit to cover it? And, did she intend or believe at the time she wrote it that payment would be refused by her bank upon presentation? N.Y. Penal L Sec. 190.05. Alternatively (and even more simply): Did Lynn Conway stop payment on the check on May 11, 1977? (The last question is quite clearly answered by the stop payment order printed at JA-40). It cannot require enormous investigative and legal resources to prepare to try those issues.

The delay of nearly two and a half years is unconscionable.[17]

The delay greatly exceeded the New York State speedy trial period, namely, 60 days. Section 30.30 1(c) of the New York Penal Law provides that if a defendant is accused of a Class B misdemeanor (of which Issuing a Bad Check, N.Y. Penal L. Sec. 190.05 (A-III) is one) a motion to dismiss must be granted if the people are not ready for trial within sixty days of commencement of the criminal action.

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17 Petitioners assert, by way of justification for the delay, that Vincent Cerbone was the only Justice available. However, Acting Justice Bender handled the arraignment and, presumably, could have been called back into service. Alternatively, as suggested by the August 16, 1979 docket entry (over two years after Lynn Conway's arrest) the matter could be transferred to another district (JA-51). To allow criminal charges to be pending for an indefinite period simply because the only available judge has recused himself is clearly violative of the speedy trial provisions. The charges could pend for decades.

For purposes of Section 30.30, an action commences upon arrest and the filing of an accusatory instrument. N.Y. Crim. Proc. L. Secs. 1.20(17). See also N.Y. Crim. Proc. L. Sec 100.05. E.g., People v. Lomax, 50 N.Y.2d 351, 355-356 (1980); People v. Collins, 93 A.D.2d 981 (4th Dep't 1983). The arrest and filing of the accusatory instrument took place on June 30, 1977. The sixty day period of Section 30.30 would have run on August 29, 1977. Even charging Conway with the adjournments up to the time she entered her plea, August 4, 1977, one hundred and eighty days (three times the statutory period) elapsed before the next step in the action, Conway's speedy trial motion.

The delays in prosecuting Conway clearly violated the sixty day requirement of Section 30.30. While that period is not controlling as the the period

allowable under the Sixth Amendment, it provides guidance. Respondent submits that the delays greatly exceeded any guarantee of a speedy trial.

D. Respondents deprived, or tried to deprive, Lynn Conway of her right to sue for malicious prosecution and abuse of process.

An integral element of a cause of action for malicious prosecution is the favorable termination, on the merits, of the criminal proceeding. A termination other than on the merits will not allow a malicious prosecution action. Halberstadt v. New York Life Ins. Co., 194 N.Y. 1, 10-11 (1909); Singleton, supra, 623 F.2d at 193. Cerbone, a lawyer and a village justice, was aware of that element when he appended "(not on the merits)" to the docket sheet. His conduct was clearly an attempt to preclude

Ms. Conway from suing for malicious prosecution in the State Courts.[18]

A cause of action is a property interest for purposes of the Fourteenth Amendment "life, liberty or property."

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18 The possibility of a malicious prosecution action was clearly in the air. The first step taken by the district attorney, upon entering the picture, was to obtain a release from Conway. That release stated "in effect that the District Attorney's office would not be sued for malicious prosecution." (JA-57).

At the time of the dismissal, New York law was unsettled as to whether a dismissal due to the period of time that had elapsed was a dismassal "on the merits" for purposes of malicious prosecution. The first case to have decided the issue is Brown v. Town of Henrietta, 118 Misc.2d 133 (Sup. Ct., Monroe County 1983). An earlier case, decided after September 20, 1970, Chmielewski v. Smith, 73 A.D.2d 1053 (4th Dep't 1980) suggested that result in dictum. Thus, Conway's cause of action was unclear as of the time of the dismissal and would probably have had to be resolved on appeal. Further, she would have had to overcome the "(Not on the merits)" that Cerbone added to the docket sheet.

It is state law which creates property interests. E.g., Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972); Oberlander v. Perales, 740 F.2d 116, 120 (2d Cir. 1984). New York recognizes a cause of action as a property interest. E.g., Slewett & Farber v. Board of Assessors, 80 A.D.2d 186, 214 (2d Dep't), appeal dismissed, 54 N.Y.2d 771 (1981), modified on other grounds, 54 N.Y. 547 (1982). See Logan, supra.

Justice Cerbone's conduct (apart from being a further showing of malice and partiality) also took away (or severely impaired) Conway's right to sue in state courts for malicious prosecution. At the time, New York law was unclear whether a dismissal for passage of time constituted a dismissal on the merits. Further, a court would be expected to give deference to the "(not on the

merits)".

Cerbone's impairment of Conway's interest in her cause of action was a deprivation of property. "'[D]eprive' in the due process sense cannot just mean 'destroy.'" Reed v. Village of Shorewood, 704 F.2d 943 (7th Cir. 1983) (Interference with use of real property). See Fuentes v. Shevin, 407 U.S. 67, 84-86 (1972). There can be no argument that Cerbone's addition of the parenthetical to the docket sheet was done without due process; there was no opportunity for a fair hearing either before or afterwards. Thus, respondent submits, Cerbone's act is sufficient to support a procedural due process claim.

POINT III

THE COURT OF APPEALS CORRECTLY HELD THAT A SECTION 1983 CLAIM MAY INCLUDE A CLAIM FOR MALICIOUS PROSECUTION UNDER STATE LAW.

The Court of Appeals concluded that, on the facts of this case, the allegations of malicious prosecution under state law also stated a claim under Section 1983. The court relied on its prior decision in Singleton v. New York, supra, which held that a Section 1983 claim may be made out by showing a malicious prosecution.

The court also relied on Judge Conner's opinion in Pyles v. Keane, 418 F.Supp. 269 (S.D.N.Y. 1976) Pyles holds that:

> Conduct that may give rise to an action for malicious prosecution may also constitute a violation of Section 1983 if, acting under color of state law, the defendant has thereby subjected the plaintiff to a deprivation of constitutional magnitude.... But standing alone, a claim of malicious prosecution--although it may describe conduct reprehensible in the extreme--is not enough to support a cause of action under Section 1983.

418 F.Supp. at 276. Pyles cites several cases in support, including Nesmith v. Alford, 318 F.2d 110 (5th Cir. 1963), cert. denied, 375 U.S. 975 (1964); United States ex rel. Rausch v. Deutsch, 456 F.2d 1301 (3rd Cir. 1972); Paskaly v. Seale, 506 F.2d 1209 (9th Cir. 1974). Other circuits have considered the issue, including Cramer v. Crutchfield, 648 F.2d 943 (4th Cir. 1981); Dunn v. State of Tennessee, 697 F.2d 121 (6th Cir. 1982) cert. denied sub nom Wyllie v. Dunn, 469 U.S. 1086 (1983); Wells v. Ward, 470 F.2d 1185 (10th Cir. 1972). Thus, the courts of appeal that have considered the matter are in accord with the proposition that allegations of malicious prosecution may state a claim under Section 1983. They

also agree that a Section 1983 claim requires state action and a deprivation of a federal right as well. Judge Oakes' opinion below is in accord.

As the Second Circuit found (and is not seriously contested in this appeal), the petitioners' conduct is actionable as a malicious prosecution. The Second Circuit has enumerated the elements of the tort as follows:

> (1) the defendant either commenced or continued a criminal proceeding against him; (2) that the proceeding terminated in his favor; (3) that there was no probable cause for the criminal proceeding; and (4) that the criminal proceeding was instituted in actual malice.

(A-26, quoting Russo v. New York, 672 F.2d 1014, 1018 (2d Cir. 1982)).

Respondent submits that the elements of the tort of malicious prosecution, standing alone, are insufficient to state a violation of federal rights. Something

more is necessary, namely, the conduct must violate some constitutional right and the wrongful action must be taken under color of state law. As was stated in Dunn,:

> [I]f misuse of a legal proceeding is so egregious as to subject the aggrieved individual to a deprivation of constitutional dimension, and the tortfeasor is acting under color of state law, 1983 may be employed.

697 F.2d at 125. The additional elements, needed to satisfy the language of Section 1983, also avoid making "every state criminal prosecution which ends in an acquittal automatically a violation of Federal Rights statutes." Nesmith, 318 F.2d at 126. The cases dismissing Section 1983 claims alleging malicious prosecution are numerous; the reason, frequently, is the failure of the plaintiff to show a constitutional deprivation. E.g., Pyles, Paskaly, Cramer, and Wells,

supra. Thus, the need to show acts taken "under color of" state law and violations of constitutional rights prevents opening too wide the courthouse doors and "mak[ing] of the Fourteenth Amendment a font of tort law." Paul, 424 U.S. at 701.

The tort of malicious prosecution gives the courts guidance in deciding what conduct is wrongful, or, in Section 1983 terms, what conduct that constitutes a "deprivation". Respondent submits, however, that the state tort law does not control the scope of a "deprivation". As Judge Doyle wrote on the relationship between the federal and state standards for an arrest in Wells:

> While it is true that the state law with respect to arrest is looked to for guidance as to the validity of the arrest since the officers were subject to those local standards, it does not follow that state law governs. On the contrary, the rights

> claimed arise under the federal law and thus the ultimate standard must be Section 1983, the Fourteenth Amendment to the Constitution and federal decisions.

470 F.2d at 1187. The same must be said for the state law of malicious prosecution: It provides guidance but does not govern.[19]

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19 Petitioners suggest that the Second Circuit has adopted a theory that Section 1983 incorporates the state law of malicious prosecution. (Br. at 32 n. 20). In support, they quote the following from Judge Oakes' opinion in Raysor v. Port Authority, 768 F.2d 34, 40 (2d Cir. 1985): "Because the same four elements must be proved for both the tort of malicious prosecution and the related section 1983 violation, ... the claims are virtually identical." Judge Oakes, however, was not there expounding constitutional doctrine, rather, he was guiding the district court in formulating a charge for the remand. Further, "virtually identical" is not the same as "identical".

The incorporation of state law may raise constitutional havoc. The laws of the several states are not uniform; there is no requirement for the state to recognize the tort of malicious prosecution. If Section 1983 incorporates state law, what would happen if New York, say, were (cont'd)

Just as not all malicious prosecution allegations are sufficient to state a Section 1983 claim, not all Section 1983 claims sounding in malicious prosecution should require all the elements of malicious prosecution.[20] Conduct that is wrongful under state law does not necessarily amount to a "deprivation". Daniels, supra, for example, found that negligence, while actionable under state

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to abolish the tort of malicious prosecution? Conduct sounding in malicious prosecution that would violate Section 1983 in New Jersey would, presumably, be innocent in New York. Such would clearly be contrary to the Supremacy Clause. U.S. Const., Art. VI, Cl. 2.

20 Suppose, for example, that Conway, aware of Cerbone's animus, decided to forego her right to a trial and accepted an adjournment in contemplation of dismissal. That acceptance, however, would destroy her tort cause of action, Singleton, but her federal rights would have been no less deprived. Petitioner suggests that the absence of a favorable termination, under that circumstance, should not be fatal to a claim under Section 1983.

law, was insufficient to state a claim under Section 1983. See Davidson v. Cannon, No. 84-6470, 54 U.S.L.W. 4095 (Jan. 21, 1986). In contrast, conduct that is permissible under state law may be a deprivation for Section 1983. E.g., Perry v. Sinderman, supra (discharge of teacher for exercise of first amendment rights). Respondent submits that if a claim sounds in malicious prosecution, a court must not slavishly apply the state law; rather it should examine whether the conduct, even if it lacks elements of the tort, states a "deprivation" for purposes of Section 1983. That assessment is to be made as a matter of federal law. Dellums v. Powell, 566 F.2d 167, 175-176 (D.C.Cir. 1977), cert. denied, 438 U.S. 916 (1978); see Pierson v. Ray, 386 U.S. 547, 556-557 (1967).

Respondent submits that the tort of malicious prosecution is relevant in considering whether there has been a violation of Section 1983. It goes to the issue of whether there was a deprivation. Ultimately, however, state law does not control, federal law does.

CONCLUSION

For the reasons set forth herein, the judgment of the Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted.

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June 13, 1986

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APPENDIX

United States Constitution:

U.S. Const., Art. VI, Cl. 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const., Amend. IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const., Amend VI (in part):

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed....

New York Statutes (McKinney's):

N.Y. Crim. Proc. L., Sec. 1.20(17):

> "Definitions of terms of general use in this chapter"
>
> "Commencement of criminal action." A criminal action is commenced by the filing of an accusatory instrument against a defendant in a criminal court, and, if more than one accusatory instrument is filed in the course of the action, it commences when the first of such instruments is filed.

N.Y. Crim. Proc. L., Sec 30.20:

> "Speedy trial; in general"
>
> 1. After a criminal action is commenced, the defendant is entitled to a speedy trial.
>
> 2. Insofar as is practicable, the trial of a criminal action must be given preference over civil cases; and the trial of a criminal action where the defendant has been committed to the custody of the sheriff during the pendency of the criminal action must be given preference over other criminal actions.

N.Y. Crim. Proc. L., Sec. 30.30 (in part):

> "Speedy trial; time limitations"
>
> 1. Except as otherwise provided in subdivision three, a motion made pursuant to paragraph (e) of subdivision one of section 170.30 or paragraph (g) of subdivision one of section 210.20 must be granted where the people are not ready for trial within:
>
> * * *
>
> (c) sixty days of the commencement of a criminal action wherein the defendant is accused of one or more offenses, at least one of which is a misdemeanor punishable by a sentence of imprisonment of not more than three months and none of which is a crime punishable by a sentence of imprisonment of more than three months;
>
> * * *

N.Y. Crim. Proc. L., Sec. 100.05 (in part):

> A criminal action is commenced by the filing of an accusatory instrument with a criminal court
>
> * * *

REPLY

BRIEF

Supreme Court, U.S.
FILED
NOV 1 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1947

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

VINCENT T. CERBONE, as Justice of the Village Court, Village of Mt. Kisco, New York,

Petitioner,

– and –

BANO BUICK, INC., ALFRED MARTABANO, and ALFRED V. MARTABANO,

Co-Petitioners,

– against –

LYNN H. CONWAY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER AND CO-PETITIONER

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New York, New York
31 October 1986

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SUMMARY

Respondent misstates the record, New York law, and federal law, in attempting to sustain the judgment on a host of theories which are inconsistent with the holding below. She contends here that petitioners are responsible for a "delay of over two years" (brief at i, 56) in bringing her to trial, simply ignoring the delay occasioned by her own appeal of a non appealable order, repeated failures by her or her counsel to attend court dates, and numerous adjournments either sought or acquiesced by her (JA 48-52).[1] She bolsters her record on a factual issue by (apparently) contending (brief at 9) that at the <u>first</u> return of her 10 May 1977 check with an advice of insufficient funds the "check had 'payment

1. "JA" refers to the Joint Appendix; "A" refers to the appendix to the certiorari petition.

stopped' stamped on it," (brief at 9), a contention contrary to the record and the opinion below (A-12) which noted that the stop payment advice was on the second return of the check. It is simply not true that "[a]lthough he claims to have recused himself from this matter on August 4, 1977, Justice Cerbone made all decisions thereafter" (footnote omitted) (brief at 47). She makes a subtle, but critical, misstatement by claiming that she "had money in the account to cover the check" [when issued](emphasis supplied)(brief at 8). Rather, Mrs. Conway's affidavit (JA 36) conceded that although she had funds available, they were not in the account at utterance and she did not make a timely deposit (JA 36).

Respondent seriously misconstrues both New York and federal law in several key areas. First, she repeatedly asserts that the critical factual issue on the

bad check charge is whether the bank returned the check "insufficient funds" in error (brief at 10, 11, 12, 14, 26, 55). Whether the check was returned "stopped payment" or "insufficient funds", it was equally "dishonored" and hence "payment was refused" within the meaning of Penal Law ("PL") §190.05 (1)(c). Second, petitioner incorrectly argues that her false arrest and false imprisonment claims are viable, ignoring that the court below dismissed them as a matter of federal law (A-21), necessarily rejecting the argument she advances here, essentially a less eloquent restatement of the dissenting opinion in Singleton v. City Of New York, 632 F. 2d 185, 201-05 (2d Cir. 1980), cert. denied, 450 U.S. 920 (1981).

Respondent has conceded the first two questions on which certiorari was granted by admitting "that the elements

of the tort of malicious prosecution, standing alone, are insufficient to state a violation of federal rights. Something more is necessary, namely, the conduct must violate some constitutional right and the wrongful action must be taken under color of state law" (brief at 64-65). However, she demonstrates no federal rights. Her speedy trial (brief at 57-58), impartial forum (brief at 46-51), false arrest (brief at 40-46), and docket notation (brief at 58-61) theories of liability are not properly here because they were never raised below, no cross petition was filed, and if they were accepted here or below as the basis of the holding, would lead to a very different judgment than the one on which certiorari was granted. Both respondent and amicus ACLU do, however, apparently allege a "substantive due process" theory of liability which should be rejected on the merits. We address seriatim.

RESPONDENT HAS MISSTATED THE RECORD

Respondent would have this court reach and decide the question of whether "a delay of over two years in offering a trial for a simple misdemeanor [states] a deprivation of speedy trial rights under the Sixth Amendment" (brief at i-ii), contending that "[t]he delay of nearly two and a half years is unconscionable" (footnote omitted)(brief at 56). The last thing Mrs. Conway as a defendant in the criminal action actually wanted was a trial, and she took great lengths to avoid it, obviously not savoring her prospects in light of the fact that she had admittedly overdrawn her checkbook balance when uttering the check to the Martabanos on 10 May 1977. Whether she "intended or believed", PL §190.05(1)(b), that the check would be dishonored presents a serious question of her own

credibility whether, at the time of utterance, she then had the intention of paying for work which was in "explicit violation" of the repair agreement (JA 36), and of honoring a check she was "threatened and intimidated" (ibid.) into giving. Dishonor is conceded (PL §190.05(1)(c)), and in view of her admission that she failed to make a necessary covering deposit (JA 36), she apparently concedes insufficient funds at presentment. PL §190.10(2). Thus a trial presented a real risk of conviction.

The docket sheet for the criminal action shows adjournments on 7/7/77; 7/21/77; 5/24/79; 7/26/79; 8/30/79; 9/6/79; 9/13/79 (JA 49-51). Mrs. Conway apparently objected to none of these (some were clearly at her request). At no time has she ever alleged that any of these adjournments were over her objection.

Mrs. Conway moved to dismiss the accusatory instrument by motion returnable on 2/16/78, which petitioner Cerbone denied on 3/7/78 (JA 64-65) when he was the only available town justice (JA 51). The latter point is not disputed on this record. Mrs. Conway then took an appeal from this ruling (which is clearly non appealable), which delayed the matter for over a year until her appeal was dimissed on 2 March 1979 (JA 66). In the interim, the court record and notes were transferred to the District Attorney's office (6/7/78).

The final tactic to avoid trial was simply not to appear. On 6/7/79, 6/21/79, and 7/3/79 defendant or Mr. Stix, her attorney, simply failed to show up. When Conway finally appeared on 7/26/79, she requested an adjournment to 8/2/79, and then didn't show up on the requested adjourned date. The only

period of time not explicitly accounted for is that between 8/4/77 when Conway entered her plea, and 2/1/78 when she moved to dismiss. According to the order denying the motion to dismiss, there were settlement negotiations ongoing between the Martabanos and the Conways (JA 64). Neither Mrs. nor Mr. Conway could state with any specificity at all the duration or timing of these negotiations (JA 260-261; 331-334). Her Sixth Amendment theory is thus not presented by the record.

It is not true that "Bano's bank, Bankers Trust Company, returned the check [on 18 May 1977] with an advice saying that the return was for 'Insufficient [funds]' (JA 27), notwithstanding that the check had 'payment stopped' stamped on it" (brief at 9). She has never heretofore contended that at the first return the check was marked "stopped" (JA

36) and nothing in the record suggests this. The court below, reviewing the record, noted that the "stop payment" mark occurred on the second, not first, return (A-12).[2]

Respondent misstates the record on a critical point by stating that she "had money in the account to cover the check" [when issued] (brief at 8). Rather, respondent conceded that she lacked funds in the account when the check was drawn; her version was much different, i.e., that she intended to make a covering

2. Petitioner again misstates the record in contending that it "is not clear whether Justice Cerbone's (sic) bank or Conway's erred in stating that there were insufficient funds" (brief at 9, n.3). Mrs. Conway's bank has admitted an error (JA 41), although it has never admitted that the initial "insufficient funds" advice (JA 27) was an error, and the stop payment order (JA 40) notwithstanding, Conway's bank statement (JA 28) shows that she in fact lacked sufficient uncommitted funds deposited on the date of the check, 10 May 1977.

deposit,[3] not a defense (heretofore) under New York law. People v. Parker, 51 Misc. 2d 843, 844, 274 N.Y.S. 2d 38, 40 (1966).

It is not true that "[a]lthough he claims to have recused himself from this matter on August 4, 1979, Justice Cerbone made all decisions thereafter" (brief at 47). Respondent herself acknowledges that "the case did come before two other Justices" (brief at 19); Justice Bender, whose impartiality Conway concedes (brief at 19), denied Conway's motion to dismiss on 3/23/78 (JA 50), and Justice Joseph Cerbone, petitioner's brother, denied a further motion to dismiss on 8/30/79 (JA 51). If petitioner has a claim against Cerbone, therefore, it must rest on his

3. "I had sufficient funds to cover the check when drawn and had I not stopped payment on this check, I would have made the deposit the morning following the day written." JA 36.

denial of the motion to dismiss, since he is not charged with "conspiring" with any other village justice.[4]

RESPONDENT HAS MISSTATED THE LAW

The Law of Bad Checks

Respondent apparently believes that the controlling question under the New York law of uttering a false instrument is: "Did Lynn Conway stop payment on the check on May 11, 1977 ?"[5] (brief at 55).

4. Nothing in the record confirms the allegation that Mrs. Conway "was not allowed to use the ladies room. Instead she had to use the toilet in an open cell" (brief at 14; 42). Since this is apparently not alleged as an independent constitutional claim, her amplification of the record is harmless.

5. See also brief at 10: "Lynn Conway also talked to Bano's officers, making it clear that the check did not bounce; she had stopped payment (references omitted; emphasis supplied); brief at 11: Justice Cerbone . . . knowing of the stop payment and that §190.05 should not apply . . . (emphasis supplied).

If we understand respondent, she is contending that unless the check is returned (correctly) for "insufficient funds", no prosecution lies under PL §190.05, and that since petitioners admittedly knew that she had stopped payment on the check, and possibly that the bank should have originally returned the check as "stopped payment", petitioners therefore knew Conway could not have been guilty under PL §190.05. This misconstrues the statute.

Mrs. Conway would be just as guilty under PL §190.05, the section under which she was charged, for a "stop payment" as for an "insufficient funds" return. The statute does not require that the check be returned "insufficient" as an element of the misdemeanor; rather it simply requires that "payment [be] refused by the drawee upon presentation", PL §190.05(1)(c) & (2)(c). "Payment is

refused" within the meaning of the statute whether the check is "stopped" or "insufficient". See U.C.C. §3-5076 Thus if Lynn Conway in fact had insufficient funds when she uttered the instrument on 10 May 1977 [PL §190.05(1)(a) requires sufficiency be determined at the time of utterance, i.e, delivery, PL §190.00(4)], then she is guilty if she did not intend the check to be honored, whether or not she stopped payment.7 This comports with

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6. (1) An instrument is dishonored when

   (a) a necessary or optional presentment is duly made and due acceptance or payment is refused or cannot be obtained within the prescribed time * * * or

   (b) presentment is excused and the instrument is not duly accepted or paid.

7 Her own affidavit (JA 36), claiming an intention to make a covering deposit, constitutes an admission that she lacked sufficient funds at the time of utterance. Thus we think Cerbone is correct that the second advice showing stop payment "had nothing to do with the matter" (respondent's brief at 11), since a "stop payment" satisfies PL §190.05(1)(c), and hardly negates the appearance that she "intended or believed" that payment would be refused. PL

Cont'd.

common sense. A person who passes a check against insufficient funds is not any less guilty because she beats the check to the bank and puts a stop payment order on a check which was insufficient when uttered. In either case, we can presume that she "intends or believes at the time of utterance that payment will be refused by the drawee upon presentation", PL §190.05(1)(b) & (2)(b). If Mrs. Conway's construction of PL §190.05 were correct, every issuer of a bad check would have a sure-fire defense by the expedient of a stop payment order which precedes presentment to the drawee bank.

The only relevance to the so-called bank "mistake" is on the issue of whether petitioners had reasonable grounds to believe that Conway did not "then have sufficient funds with the drawee", PL

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§190.05(1)(b).

§190.05(1)(a), when she uttered the check. This is the crucial issue which the court below sent for trial, noting (petitioners contend erroneously) that "Mrs. Conway could argue with some persuasiveness that at all times there were sufficient funds available to cover the check" (A-14).8

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8. Had the court below not been "incorporating" New York's law of malicious prosecution under 42 U.S.C. §1988 (A26-27), it could have ruled on this issue as a matter of law, since the relevant facts on the issue were largely undisputed [we assume, without conceding, that Dry Dock customarily honored her checks, as she states; she alleges no credit agreement]. In most jurisdictions, if the facts are undisputed, the question of probable cause is for the court to rule as a matter of law. Prosser, Law of Torts, §119 at 846-47 (4th ed. 1971). New York, however, is the leading exception to this rule. Id. If under the agreed facts Mrs. Conway lacked sufficient funds at the time of utterance, then probable cause for the prosecution necessarily follows. There is a statutory presumption that she knew of the insufficiency, §190.10(1), and that she intended or believed dishonor if she also lacked funds at presentment. PL §190.10(2)(b)(iii), a point she apparently concedes when she notes that she failed to make the necessary covering deposit (JA36). That "payment [was] refused", PL §190.05(1)(c), is not disputed.

Recovery for false arrest

To resuscitate her arrest and imprisonment claims, respondent also insists that "New York law has been clear for more than a century that the tort of malicious prosecution awards damages for all injuries sustained as a result of the prosection. The compensable injuries include those which flow from execution of an arrest warrant" citing cases.[9]

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9. Respondent's citations (brief at 44) do not support her contention since in none of them was the question here presented addressed, i.e., what damages are recoverable when in a malicous prosecution/false arrest case, one tort, but not the other, can be recovered. Sheldon v. Carpenter, 4 N.Y. 579 (1851) simply held that in an action for slander, it was error for the trial court to have excluded evidence offered by the defendant, that the same words for which plaintiff was seeking a slander verdict had already been the subject of a malicous prosecution action between the same parties, and judgment already entered. Burlett v. County of Saratoga, 111 A.D. 2d 426, 488 N.Y.S. 2d 319 (3d Dep't 1985) dealt solely with excessiveness of the verdict, liability being con-

Cont'd.

First of all, respondent's argument is irrelevant, since the Second Circuit below dismissed the false arrest and imprisonment claims under federal, not New York, law, relying on Singleton v. City of New York, 632 F. 2d 185, 192-93 (2d Cir. 1980), cert. den., 450 U.S. 920 (1981) (A-22). Singleton rejected the precise argument plaintiff here makes, then presented by Chief Judge Weinstein in dissent, 632 F. 2D 185, 195-205 that the arrest and prosecution should be thought of as a single cause of action for limitations purposes and damages allowed for both if the malicious

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ceded. Loeb v. Teitelbaum, 77 A.D. 2d 92, 432 N.Y.S. 2d 487(2d Dep't 1980), modified, 80 A.D. 2d 838, 439 N.Y.S. 2d 300 (2d Dep't 1981), dealt with the issue of favorable termination; Vina v. City of New York, 104 Misc. 2d 958, 429 N.Y.S. 2d 346 (Sup. Ct. 1980), held that the City, under the circumstances, could not vacate a default. Not a single case plaintiff cites discusses the measure of recovery when one, but not the other, tort is allowed.

prosecution claim were timely. 632 F. 2d at 201-205.

If New York law governed, it is not what plaintiff contends. When necessary to distinguish the recovery under false imprisonment from that under malicious prosecution, the case law uniformly considers damages for false imprisonment to run up to the arraignment, and damages for malicious prosecution to follow the arraignment:

> damages for false imprisonment are not recoverable after arraignment (citation omitted). Subsequent damages resulting from continued incarceration are attributable only to the tort of malicious prosecution * * * [C]laimant cannot recover for injuries other than in consequence of his prearraignment detention.

Dabbs v. State, 59 N.Y. 2d 213, 218, 464 N.Y.S. 2d 428, 430, 451 N.E. 2d 186, 188 (1983)(where claimant prevailed on false arrest but not malicious prosecution claim, error to allow damages for

incarceration following arraignment); Palmquist v. City of Albany, 112 A.D. 2d 624, 625, 492 N.Y.S. 2d 487 (3d Dep't 1985)(counsel fees after arraignment disallowed where false arrest but not malicious prosecution established); Woodard v. City of Albany, 81 A.D. 2d 947, 439 N.Y.S. 2d 701 (3d Dep't 1981)(same). In the exact situation here presented, i.e., where a malicious prosecution claim is presented but no false arrest recovery is allowed, "plaintiff must establish his damages resulted from malicious prosecution and not from the false imprisonment" (emphasis supplied). Miller v. City of New York, 90 A.D. 2d 483, 454 N.Y.S. 2d 551 (2d Dep't 1982). Mrs. Conway is therefore limited to the damages which follow the arraignment, and as Miller, supra, holds, she would not be allowed a recovery for the arrest and 7 hourse of

detention which preceded the arraignment.

In this case plaintiff is making a claim of a "fraudulently procured arrest warrant" (brief at 45). Such a claim is clearly one for false arrest under New York law, even if plaintiff is correct that New York law is determinative on this. E.g., Gisondi v. Town of Harrison, __ A.D.2d __, N.Y.L.J. 30 Oct. 1986 at 3, col. 3 (2d Dep't 1986); Ross v. Village of Wappingers Falls, 62 A.D. 2d 892, 896-97, 406 N.Y.S. 2d 506 (2d Dep't 1978)(false arrest lies where fraud or perjury procured warrant). Her citations to Union Pacific Railway Co. v. Botsford, 141 U.S. 350 (1891) and Terry v. Ohio, 392 U.S. 1 (1968)(brief at 41), thefore invoke precisely the interest which the court below dismissed as time barred under Singleton v. City of New York, 632 F. 2d at 192-93. No cross

petition from the dismissal of these claims have been filed, hence this Court lacks jurisdiction to revive the dismissed claims. E.g., Federal Energy Commission v. Algonquin SNG, Inc., 426 U.S. 548, 560 n. 11 (1976).[10]

RESPONDENTS COUNTER STATEMENT OF THE QUESTIONS PRESENTED ARE NOT PROPERLY HERE

Without a cross petition, respondent submits several "Questions Presented" (i-ii) which are plainly not subsumed within those on which certiorari was granted, and which would lead to very different holdings than the one under review.

10. This may be especially true of a plaintiff attempting to circumvent a timeliness ruling against her. See Alaska Industrial Board v. Chugach Electric Association, 356 U.S. 320, 324-25 (1958).

Denial of an unbiased forum

The "denial of an unbiased forum" (brief at i, 46-51) is an apparent attempt to revive claims that the Second Circuit held barred by absolute immunity; factually, this theory is indistinct from the alleged denial of a speedy trial, since the only ruling by Cerbone complained of is his denial of her motion to dismiss. The "denial of an unbiased forum" has never been recognized as an independent tort claim. Cf. Aetna Life Insurance Co. v. Lavoie, __U.S.__, 54 U.S.L.W. 4381 (22 Apr. 1986)(party who suffers an adverse judgment by judge who pecuniary interest in case has due process claim to have adverse judgment set aside). Mrs. Conway prevailed, however, when defendant Justice Cerbone granted the People's motion to dismiss, and thus there is no judgment she seeks to set aside. Cerbone's ruling on

plaintiff's motion is not a due process violation since it is undisputed on this record that he was then the only available town justice. Indeed, on this record, there is no reason to suppose his decision was an error.

A damages action under §1983 for "denial of an unbiased forum" would compensate the complainant not for the expense, indignity, and harassment of the proceeding in toto, as would the malicious prosecution theory adopted below, but for the quantum of indignity, aggravation and damages due to the alleged bias of the forum. Nor is the logic of such a tort claim limited to prior actions in which plaintiff prevailed; unsuccessful plaintiffs could perhaps argue more vigorously that their injury, being more substantial, was more worthy of recognition, and thus the common law limitation of favorable

termination in malicious prosecution claims would be superseded. The interest asserted, i.e., damages for "bias", is too speculative to warrant encouraging a flood of litigants unhappy with a judge's rulings. At any rate, this is plainly not a rationale that would sustain the judgment below.

Right to a speedy trial

Respondent's "speedy trial right" under the Sixth Amendment theory (brief at i; 51-58) suffers a number of defects besides an inadequate record. First, Mrs. Conway admits that the Martabanos prosecuted this case pro se (JA 36, 373); this Court has never held that the Sixth Amendment guarantee of a speedy trial applies to a private prosecution, let alone a private pro se prosecution. Whether a denial of a speedy trial constitutes a civil damage claim under

§1983 at all presents a difficult question not decided below. Cf. Turner v. Lynch, 534 F. Supp. 686, 689 (S.D.N.Y. 1982)(failure to give Miranda warnings not actionable under §1983); but see O'Hagan v. Soto, 725 F. 2d 878, 879 (2d Cir. 1984)(assuming, without deciding, that a denial of right to counsel could be remedied by a §1983 claim). At any rate, such a theory would support only a judgment for the injury caused by the (unconstitutional) delay, not the total prosecution which is the holding below.

Docket notation

Escalating an evidentiary ruling on whether respondent could allege favorable termination so as to support a malicious prosecution claim (A-27-28), respondent attempts to turn the evidence issue into a new cause of action.[11] It requires only

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11. See McClary v. O'Hare, 786 F.2d 83, 89 (2d Cir. 1986)(Oakes, J.)

brief rebuttal: First, Mrs. Conway has never even alleged that the proceedings terminated "on the merits" and indeed, her state court pleading admits that the action "was dismissed in the interest of justice" (JA 21), which is not a termination on the merits. Criminal Procedure Law §170.40. Her counsel, who was present during the dismissal, swore that "an expressed determination on the merits in a criminal prosecution is not necessary" (JA 56), hence Mrs. Conway has conceded on the record that the "not on the merits" phrase is accurate. Justice Cerbone's docket notation is virtually identical to that in Brown v. Town of Henrietta, 118 Misc. 2d 133, 459 N.Y.S. 2d 996 (Sup. Ct. 1983), which held that such a notation is a sufficiently favorable termination to allow a malicious

prosecution claim to proceed.[12] Further, Mrs. Conway demonstrates no damages flowing to her from the docket entry.

NO "SUBSTANTIVE DUE PROCESS" TORT CAN BE RECOGNIZED HERE

Amicus ACLU urges a recognition here of "substantive due process", brief at 34, as a basis of liability, and while respondent's brief is more ambiguous it cites "substantive due process rights", brief at 49, it claims were violated. Although the Court below agreed with Cerbone that "substantive due process" was not implicated (A-5),[13] respondent is

12. The precise docket notation litigated in Brown was "This dismissal was not on the merits of the charge, but solely because of the delays in prosecuting." Brown v. Henrietta, 118 Misc. 2d at 134, 459 N.Y.S. 2d at 998.

13 Following the grant of certiorari in the instant case, Judge Oakes, again writing for the Second Circuit, recast his holding as "the essence of a substantive due process violation." McClary v. O'Hare, 786 F. 2d 83, 87 n.4 (2d Cir. 1986).

free to present any argument supported by the record that would sustain the holding below.

Not surprisingly, neither respondent nor amicus ACLU cite any "substantive due process" caselaw from this Court, and indeed, this Court has never recognized a tort action in favor of a plaintiff founded on a "substantive due process" theory.

For argument we start with Justice Stevens' tripartite classification of the due process caselaw which both ACLU and respondent have quoted and relied on:

> [T]he Due Process Clause of the Fourteenth Amendment . . . is the source of three different kinds of constitutional protection. First, it incorporates specific protections defined in the Bill of Rights. Thus the State, as well as the Federal Government, must comply with the commands in the First and Eighth Amendments; so too, the State must respect the

> guarantees in the Fourth, Fifth and Sixth Amendments. Second, it contains a substantive component, sometimes referred to as "substantive due process," which bars certain arbitrary government actions "regardless of the fairness of the procedures used to implement them" Ante, at 5. Third, it is a guarantee of fair procedure, sometimes referred to as "procedural due process": the State may not execute, imprison, or fine a defendant without giving him a fair trial, nor may it take property without providing appropriate procedural safeguards. (Footnotes omitted).

Daniels v. Williams, 54 U.S.L.W. 4090, 4093 (21 January 1986)(concurring opinion). Apart from the untimely false arrest claim, respondent is not relying on any specific protection in the bill of rights,14 and she apparently concedes

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14. Petitioners do not concede that the arrest here, under warrant, would in any event be a Fourth Amendment violation. Baker v. McCollan, 443 U.S. 137 (1979), but we assume it because of the timeliness barrier. Hence, it is not necessary to determine whether the lack of probable cause for the prosecution, which is the gravamen of common law malicious prosecution, and which "involves only the conduct of reasonable man under the circum-

Cont'd.

that if the case were cast as a "procedural due process" one, that Parratt v. Taylor, 451 U.S. 527 (1981), and Hudson v. Palmer, 468 U.S. 517, 82 L. Ed. 2d 393 (1984) would counsel dismissal.[15] Amicus ACLU, quoting the opinion concurring on the point in question in Hudson v. Palmer, 468 U.S.

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lack of probable cause for the prosecution, which is the gravamen of common law malicious prosecution, and which "involves only the conduct of reasonable man under the circumstances and does not differ essentially from the determination of negligence," Prosser, Law of Torts, §119 at 847 (4th ed. 1971), equates to a fourth amendment violation if applied to the arrest under warrant. See Frank v. Delaware, 438 U.S. 154 (1978)(to impeach warrant affidavit, defendant must show particularized and specific falsehood), but see Briggs v. Malley, 54 U.S.L.W. 4243 (5 March 1986)(affirmative defense of absolute immunity rejected for officer procuring warrant).

15. Amicus ACLU denies that "the Parratt doctrine extend[s] to substantive claims" (brief at 31); respondent takes the same tack: "In Parratt and Hudson, the Court held that the interests involved were state-created property interests and thus not federal rights" (brief at 36). However, a deprivation of property is a "substantive" claim; the issue is what process is due.

517, 541 n. 4 (1984)(Stevens, J.) argues that this is "precisely the situation described in Justice Stevens' foonote" (brief at 33). However, this is not a case of "actions government officials may not take no matter what procedural protections accompany them . . ." 468 U.S. at 541 n.4. Persons are charged with crimes every day, and Mrs. Conway disavows any claim here of constitutional defect in the process by which she was charged, as the Second Circuit noted (A-25). Thus Justice Stevens' first category of due process rights does not apply, and the third category, procedural due process, is satisfied by the common law tort remedy, if indeed a "liberty" interest within the meaning of the Fourteenth Amendment has been implicated. But even if her claim is protected as part of the "liberty" of the Due Process Clause, it is still not a "substantive due process" claim.

First, to qualify for "substantive due process" recognition, the right must be fundamental. Mrs. Conway's right to recover damages for having been charged with passing a check against insufficient funds is not "essential to the orderly pursuit of happiness by free men." Meyer v. Nebraska, 262 U.S. 390, 399 (1926). Nor is her tort action within the realm of privacy given substantive due process protection because it is the "'the most comprehensive of rights and the right most valued by civilized men,' namely, 'the right to be let alone.'" Bowers v. Hardwick, __U.S.__, 54 U.S.L.W. 4919, 4923 (30 June 1986)(Blackmun, J., dissenting), quoting Olmstead v. United States, 277 U.S. 438, 478 (Brandeis, J., dissenting).

Second, "substantive due process" is an examination of goals sanctioned by the state and expressed in its legislation.

E.g., prohibition of abortion, Roe v. Wade, 410 U.S. 311 (1973); involuntary sterilization, Skinner v. Oklahoma, 316 U.S. 535 (1942); Moore v. East Cleveland, 431 U.S. 494 (1977)(State prohibition on booth control devices)(zoning). New York does not have a policy or goal of subjecting its citizens to unfounded criminal actions, and it is only to such state-sanctioned goals, e.g., Carey v. Population Services, International, 431 U.S. 678 (1977), that substantive due process sets limitations. Substantive due process has never been invoked by this Court to subject to Federal constitutional scrutiny actions which, as here, are illegal and tortious under state law. Bowers v. Hardwick, __U.S.__, 54 U.S.L.W. 4919, 4921-22 (opinion of the Court), stands at least for the proposition that substantive due process is a doctrine of last resort, not of first.

Mrs. Conway invokes "substantive due process" to create federal jurisdiction over a claim which was time barred under state law, as her own complaint shows (A-49), so that she could have a duplicate remedy under federal law of what she already had under state law. She is hardly in the position of Mrs. Roe or Mr. Hardwick who, invoke substantive due process as the only possible protection against state laws invading fundamental interests.

CONCLUSION

The judgment below should be reversed with instructions to reinstate the order of the district court dismissing the complaint. If the judgment is affirmed, it should be remanded to decide the statute of limitations defense and good faith defenses as prayed in the prior brief.

New York, New York
31 October 1986

Respectfully submitted,

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AMICUS CURIAE

BRIEF

(6)

Supreme Court, U.S.
FILED
APR 11 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1947

In the Supreme Court of the United States

OCTOBER TERM, 1985

VINCENT T. CERBONE, JUSTICE OF THE VILLAGE COURT, VILLAGE OF MT. KISCO, NEW YORK, ET AL., PETITIONERS

v.

LYNN H. CONWAY

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Whether the injury to reputation that results from the pendency of a criminal charge deprives the injured party of "liberty" within the meaning of the Fourteenth Amendment's Due Process Clause.

2. Whether, when harm is inflicted by the malicious and unauthorized actions of an individual state official, the state's provision of an adequate post-deprivation tort remedy provides all the process required by the Fourteenth Amendment's Due Process Clause.

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No. 84-1947

VINCENT T. CERBONE, JUSTICE OF THE VILLAGE COURT, VILLAGE OF MT. KISCO, NEW YORK, ET AL., PETITIONERS

v.

LYNN H. CONWAY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

This case concerns the liability, under 42 U.S.C. 1983, of persons acting under color of state law for actions amounting to the tort of malicious prosecution, in a jurisdiction that makes malicious prosecution remediable under state law. Under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), federal officials are liable in many of the same circumstances in which state officials are liable under Section 1983. In addition, the Federal Tort Claims Act, 28 U.S.C. 1346(b) and 2671 *et seq.*, provides a cause of action for malicious prosecution. 28 U.S.C. 2680(h). This Court's decision may thus affect the extent to which federal officials are held liable for acts committed in the course of their duties.

STATEMENT

1. In April 1977, respondent had her car repaired by petitioner Bano Buick, Inc. (Bano), an automobile dealership in the Village of Mount Kisco, New York.[1] Bano installed a replacement engine; respondent paid the dealership with a check in the amount of $431.34. As respondent drove the car away from the dealership, however, it "stalled and coughed on its way to her house." Respondent immediately stopped payment on her check. Shortly afterwards, Bano was mistakenly informed by its bank that respondent's check had been returned unpaid "by reason of 'insufficient' funds." Pet. App. A10-A11. Respondent nevertheless alleges that Alfred Martabano and Alfred V. Martabano, respectively the president and vice president of Bano, either knew or soon learned of the actual reason for the bank's failure to pay on the check—respondent's stop payment order. *Id.* at A10, A12.[2]

After a number of unsuccessful attempts to resolve the payment dispute directly with respondent (Pet. App. A11, A12 n.4), the Martabanos discussed the matter

[1] The facts of this case are vigorously disputed by the parties. The district court granted petitioners summary judgment on the basis of the pleadings and affidavits submitted in connection with their motion under Fed. R. Civ. P. 56 (Pet. App. A33). In reversing, the court of appeals supplemented the record with evidentiary materials developed in a related state proceeding and submitted to the court by respondent (Pet. App. A11 n.2). Although petitioners challenged the propriety of the court of appeals' reliance on these materials (Pet. i-ii, Question 5), this Court limited its grant of certiorari to exclude that issue. Our factual statement therefore reflects the account given by the court of appeals, and is set out in the form most favorable to respondent.

[2] Respondent stated that the face of the check was marked "stop" while its reverse was stamped "stop payment," and that, when the check was put through for payment a second time, the bank correctly indicated that it had been dishonored because of a stop payment order. Pet. App. A12, A13. Respondent also asserted that she had expressly told the Martabanos of her decision to stop payment (*id.* at A12).

with petitioner Vincent Cerbone, their attorney and a part-time justice of the Village of Mount Kisco, who advised them that writing a bad check is a misdemeanor in New York (see N.Y. Penal Law § 190.05 (McKinney 1975)).[3] Pet. App. A11-A13. On Cerbone's advice, the Martabanos referred the matter to the Mount Kisco police, giving respondent's check to detective Larry McKinsey (*id.* at A12, A13). McKinsey subsequently obtained a warrant for respondent's arrest from an acting village justice on Alfred V. Martabano's complaint (*id.* at A14).[4] Respondent was arrested pursuant to the warrant on June 30, 1977, and assertedly held at the Mount Kisco police station for some seven hours prior to arraignment (*ibid.*).

After repeated requests by respondent, the criminal complaint ultimately was dismissed on September 20, 1979, on the district attorney's motion. The motion was granted by petitioner Cerbone, acting in his capacity as village justice, with the docket notation that the charge had been dismissed "due to the period of time that has elapsed (not on the merits)." Pet. App. A14-A15.[5]

2. On January 15, 1980, respondent brought suit in state court against the Martabanos, Bano, Cerbone, McKinsey, the police department of Mount Kisco and the Village of Mount Kisco, seeking damages for assault,

[3] Writing a bad check is defined as passing a check that is in fact dishonored, with the knowledge that the drawer does not have sufficient funds to support it and with the belief that payment will be refused by the bank. N.Y. Penal Law § 190.05(2) (McKinney 1975).

[4] Respondent asserts that McKinsey, but not the subscribing justice, knew the correct reason for the return of the check (Pet. App. A14).

[5] While Cerbone had earlier recused himself in the case, he indicated that he had ruled on the dismissal motion because he was the only available village justice. His involvement, however, led the court of appeals to question the "appropriateness of the docket entry parenthetical 'not on the merits.'" Pet. App. A15.

false arrest, and malicious prosecution (Pet. App. A16.)[6] On June 7, 1982, while the state court action was pending, respondent filed this suit in federal district court, seeking damages from the same defendants for the same conduct under 42 U.S.C. 1983 and 1985. The district court dismissed the action (Pet. App. A30-A39, A40-A41). Among other things, the court held that the claim against Cerbone was barred by absolute immunity because it challenged action taken in his capacity as a judge (*id.* at A40-A41). The court also held that the false arrest and assault claims were barred by the statute of limitations (*id.* at A34). And on the record before it, the court ruled that respondent could not prevail on her malicious prosecution claim because petitioners had "concluded that [respondent] had issued the check in bad faith, and instituted the criminal complaint upon advice of counsel, and without malice" (*id.* at A39).[7]

In two opinions (Pet. App. A1-A7, A8-A29), the court of appeals affirmed in part and reversed in part. In its initial opinion, the court of appeals agreed that the statute of limitations barred the false arrest and imprisonment, but not the malicious prosecution, claims. *Id.* at A22-A23.[8] The court also concluded that Cerbone was

[6] The state trial court granted McKinsey's motion for summary judgment on grounds of quasi-judicial immunity, while a state appellate court granted Mount Kisco's motion to dismiss for failure to serve a proper notice of claim. *Conway* v. *Bano Buick, Inc.*, 88 A.D.2d 609, 450 N.Y.S.2d 56 (1982). Respondent's other state claims are still pending.

[7] The court also held that respondent had not asserted a valid claim against Mount Kisco because her injury did not stem from a municipal policy or custom (Pet. App. A38).

[8] The court held that New York's general three-year limitation period (N.Y. Civ. Prac. Law § 214(2) (McKinney Supp. 1986)) governs Section 1983 actions. Because the false arrest and imprisonment claims accrued on the date of respondent's arrest, they were time-barred. The malicious prosecution claim was held to have accrued on the date that the charges were dismissed, however, which was less than three years before the suit was commenced. Pet. App. A22. See *Singleton* v. *City of New York*, 632 F.2d 185, 193 (2d Cir. 1980), cert. denied, 450 U.S. 920 (1981).

not entitled to immunity to the extent that he was sued in his capacity as counsel for Bano (*id.* at A24-A25). Turning to the merits of the surviving malicious prosecution claim, the court looked to state law to set the requirements for proving malicious prosecution,[9] holding that a trial was necessary to determine whether respondent had satisfied those requirements (*id.* at A25-A28).[10] The court did not, however, explain which of respondent's constitutional rights had been implicated by the petitioners' actions.

This omission was addressed in the court of appeals' supplemental opinion (Pet. App. A1-A7), which was issued after additional briefing. In response to the argument that respondent's claim was not of constitutional magnitude, the court quoted the complaint's allegation that "seven hours of detention and 'great humiliation, ridicule, and mental anguish' resulted from Cerbone's conspiracy with the Village, Bano Buick, and the Martabanos to execute the arrest warrant." This allegation of injury, the court held, was "quite sufficient to constitute a constitutional deprivation of liberty actionable under § 1983." *Id.* at A4.

[9] The court explained that a malicious prosecution plaintiff in New York must establish that the defendant commenced or continued a criminal proceeding against him; that the criminal proceeding terminated in his favor; that there was no probable cause for the criminal proceeding; and that the proceeding was instituted with actual malice (Pet. App. A26).

[10] The court of appeals also held that all of the defendants were proper appellees, despite a lack of clarity in respondent's notice of appeal (Pet. App. A18-A22); this Court denied Cerbone's request for certiorari on this point (Pet. ii, Question 6). To prevent Cerbone, who had not yet filed a brief, from being prejudiced by this ruling, the court gave him an opportunity to brief the case before its judgment became final (Pet. App. A21, A29). The court of appeals also ruled that the claim against McKinsey, which previously had been dismissed in state court, was barred by res judicata (*id.* at A23-A24), and it affirmed the district court's dismissal as to Mount Kisco because respondent had not alleged that her injuries were the result of a municipal policy (*id.* at A23).

The court of appeals also rejected the suggestion that, under *Hudson* v. *Palmer*, No. 82-1630 (July 3, 1984), and *Parratt* v. *Taylor*, 451 U.S. 527 (1981), respondent was foreclosed from bringing a constitutional claim because her injuries were remediable under state tort law. The court of appeals reasoned that "[t]he argument proves too much; if true, we would have to say that the Court has sub silentio overruled *Monroe* v. *Pape*, 365 U.S. 167 (1961), where the Court addressed and rejected the proposition Cerbone now advances." Pet. App. A4-A5. The court of appeals also explained that *Hudson* and *Parratt* were relevant only to deprivations of property (*id.* at A5). Finally, the court of appeals evidently held that respondent's injury involved a denial of procedural, rather than of substantive, due process: it noted Cerbone's argument that "substantive due process should not provide the source of [respondent's] due process rights," responding that "[w]e may agree without denying that those rights have been violated" (*ibid.*). The court accordingly remanded the case for trial.[11]

SUMMARY OF ARGUMENT

A. At the outset, respondent has failed to satisfy one of the fundamental requisites of a procedural due process claim: she has not established that she was deprived of a constitutionally protected interest. The court of appeals found a deprivation of liberty because respondent was arrested, detained, and subjected to ridicule and humiliation. In so ruling, however, the court overlooked its earlier, unchallenged holding that the claims growing out of respondent's false arrest and imprisonment were time-barred. Thus, the only event occurring within the

[11] The court also reaffirmed its initial rulings that Cerbone was a proper party to the appeal (Pet. App. A3-A4) and that the malicious prosecution claim was not barred by the statute of limitations (*id.* at A5-A6), and held that respondent had adequately alleged that Cerbone, in his individual capacity, had conspired with a state actor (*id.* at A6-A7).

limitations period was the lodging and continuation of the criminal charge. And the only injuries assertedly associated with this event were the mental anguish and injury to reputation that resulted from the pendency of the criminal action.

Under *Paul* v. *Davis*, 424 U.S. 693 (1976), such an injury, standing alone, does not implicate an interest in "liberty" within the meaning of the Fourteenth Amendment's Due Process Clause. The Court in *Paul* rejected the proposition that reputation alone is liberty, and held that due process requirements are triggered only when, "as a result of the state action complained of, a right or status previously recognized by state law was distinctly altered or extinguished." *Id.* at 711. Here, none of respondent's legal rights were altered by the pendency of the charge against her; petitioners did nothing to respondent in addition to the maintenance of the assertedly defamatory charge. Indeed, respondent's complaint fails to allege that petitioners' actions had *any* tangible effect on her employment or other substantial interests. Compare *Owen* v. *City of Independence*, 445 U.S. 622, 633-634 n.13 (1980).

This is not to deny, of course, that the conduct alleged by respondent was both wrongful and injurious. That consideration has prompted the states and the federal government to create causes of action to redress malicious prosecution and abuse of process on the part of state agents. But the Court has repeatedly held that wrongful state action—whether or not remediable under some other theory—does not give rise to a procedural due process claim unless it works a deprivation of a constitutionally protected interest. And the actions challenged here by respondent simply did not have "consequences sufficiently grievous to constitute a deprivation of constitutionally protected liberty." *Codd* v. *Velger*, 429 U.S. 624, 636 (1977) (Stevens, J., dissenting).

B. Because the harm inflicted upon respondent was not of constitutional magnitude, there is no need to con-

sider the adequacy of the state's procedures for redressing her injury. But even if petitioners' actions did deprive respondent of liberty, this Court's decisions in *Hudson* v. *Palmer*, No. 82-1630 (July 3, 1984), and *Parratt* v. *Taylor*, 451 U.S. 527 (1981), establish that respondent was given all the process due.

1. Respondent's claim, as interpreted by the court of appeals, is grounded entirely on an asserted denial of *procedural* due process. Yet respondent makes no challenge to the existing state procedures for the lodging and processing of criminal charges; to the contrary, her claim rests on the allegation that petitioners willfully failed to comply with state law and intentionally misled a state judicial officer. And it was precisely that type of misconduct—"the unauthorized failure of agents of the State to follow established state procedures" (*Parratt*, 451 U.S. at 543)—that *Parratt* and *Hudson* held not to give rise to a procedural due process claim. Those decisions recognized that it is impossible for the state to provide predeprivation process when the injury is caused by the unauthorized actions of state employees. In a case involving injury maliciously inflicted by an individual state official, the Court accordingly held that " 'the impracticability of providing any meaningful predeprivation process, when coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking . . . satisf[ies] the requirements of procedural due process.' " *Hudson*, slip op. 14 (quoting *Parratt*, 451 U.S. at 539).

That holding is dispositive here. Respondent's injury was not inflicted pursuant to established state procedures. And state tort law evidently would provide her with a full recovery. These factors are fatal to respondent's constitutional claim.

2. The reasons given by the court of appeals for avoiding this conclusion are unpersuasive. The court believed that it would be inconsistent with *Monroe* v. *Pape*, 365

U.S. 167 (1961), to remit respondent to her state tort remedies. But *Monroe* considered a claimed violation of the Fourth Amendment, a substantive provision of the Constitution; this case, in contrast, involves only a procedural due process claim. In the latter type of case, the adequacy of the state remedy obviously is relevant—not for exhaustion purposes, as the court of appeals evidently believed, but because those remedies are a part of the available state "process" and therefore must be considered in determining as an initial matter whether the state has committed a constitutional violation.

The court of appeals also concluded that the *Hudson-Parratt* analysis is applicable only to deprivations of property. But in determining whether a post-deprivation tort remedy is adequate, "[t]he controlling inquiry is solely whether the State is in a position to provide for predeprivation process." *Hudson*, slip op. 16. Where the deprivation is inflicted through the unauthorized act of an individual state employee, that inquiry will yield the same conclusion, whether the deprivation is of liberty or of property: in either case, it " 'is difficult to conceive of how the State could provide a meaningful hearing before the deprivation takes place.' " *Id.* at 14 (quoting *Parratt*, 451 U.S. at 541).

ARGUMENT

RESPONDENT'S CLAIM OF MALICIOUS PROSECUTION DOES NOT IMPLICATE A DENIAL OF PROCEDURAL DUE PROCESS

As the court of appeals evidently recognized, the claim in this case involves an asserted denial only of procedural due process. Such a claim requires the Court to engage in "what has become a familiar two-part inquiry: [it] must determine whether [respondent] was deprived of a protected interest, and, if so, what process was [her] due." *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982). The court of appeals conclusorily re-

solved both of those questions in respondent's favor.[12] In our view, however, a close consideration of the nature of respondent's allegations, when viewed against the background of the record in this case, establishes that the challenged actions infringed no interests of constitutional magnitude. And even if they did, this Court's decisions make clear that the remedies provided by the state accorded respondent all the process due.

A. Respondent Was Not Deprived Of Liberty

1. It is fundamental that the adequacy of a state's procedures may be subjected to constitutional challenge only after "it is determined that the Due Process Clause applies." *Cleveland Board of Education* v. *Loudermill*, No. 83-1362 (Mar. 19, 1985), slip op. 8. Here, because there is no contention that respondent's property rights were disturbed, that determination requires a finding that respondent was deprived of liberty by the state.[13] But respondent has failed to point to the deprivation of any such interest in this case.

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[12] These issues were addressed only in the court of appeals' supplemental opinion. In its earlier opinion, the court had simply assumed that conduct amounting to the tort of malicious prosecution necessarily would be actionable under 42 U.S.C. 1983. Finding a lack of "federal rules of decision for adjudicating § 1983 actions that are based upon claims of malicious prosecution" (Pet. App. A25-A26), the court then incorporated the substantive standards of New York tort law under the authority of 42 U.S.C. 1988 (Pet. App. A26-A27). But Section 1988, of course, does not federalize all of state tort law; it provides only for the limited incorporation of state law to fill procedural and remedial gaps in the federal civil rights statutes. See *Moor* v. *County of Alameda*, 411 U.S. 693, 703-704 (1973). A federal action is available under Section 1983 only to protect "federally protected rights." *Maine* v. *Thiboutot*, 448 U.S. 1, 5 (1980).

[13] Relying on *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144 (1970), the court of appeals held that the petitioners acted under color of state law because they conspired with McKinsey and with Cerbone in his capacity as a village justice (Pet. App. A25 n.12; see *id.* at A6-A7). That holding is not at issue here.

The court of appeals found that respondent had adequately asserted a deprivation of liberty by alleging that "seven hours of detention and 'great humiliation, ridicule and mental anguish' resulted from [the] conspiracy * * * to execute the arrest warrant" (Pet. App. A4). In so ruling, however, the court disregarded its earlier, unchallenged holding that respondent's claims for false arrest and imprisonment were time-barred, because those events had occurred more than three years prior to the initiation of her federal action. Thus, the claims growing out of the execution of the warrant and respondent's subsequent detention—which in other circumstances might well implicate both Fourteenth Amendment liberty concerns and substantive Fourth Amendment interests[14]—have dropped out of this case.[15] Similarly, respondent has made no claim that she was forced to appear at trial or otherwise to participate in judicial proceedings,[16] or that she was punished in any way. And she has not alleged that the charges against her changed her legal status or, indeed, had any effect whatsoever on her employment or related interests.

On this record, the only event alleged in the complaint that occurred within the limitations period was the lodging and continuation of the criminal charge. And even under a generous reading of the complaint, the only injuries assertedly associated with this event were the "mental anguish" and injury to reputation that resulted from the pendency of the criminal action. See generally

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[14] See, *e.g.*, *Dunn* v. *Tennessee*, 697 F.2d 121, 125-126 (6th Cir. 1982), cert. denied, 460 U.S. 1086 (1983); *Wheeler* v. *Cosden Oil & Chemical Co.*, 734 F.2d 254, 260-261 (5th Cir. 1984). Cf. *Gerstein* v. *Pugh*, 420 U.S. 103 (1975).

[15] Similarly, respondent's claim that she was forced to retain counsel "[b]y reason of the illegal arrest * * * and * * * unlawful detention and imprisonment" (Pet. App. A46 ¶¶ 19, 20; *id.* at A48 ¶¶ 26, 27) is associated with the time-barred false arrest allegation.

[16] To the contrary, she complains that the state *failed* to bring her to trial (Pet. App. A46 ¶ 17).

W. Prosser & W. Keeton, *The Law of Torts* 886 (5th ed. 1984) (noting the "substantial similarity if not outright identity between the malicious prosecution action and the defamation suit"). This case therefore poses only a narrow question: whether the continuation of a criminal charge, in the absence of actual prosecution or other state action, implicates a liberty interest.

2. This question is answered by *Paul* v. *Davis*, 424 U.S. 693 (1976), where the Court flatly held that injury to reputation, standing alone, does not deprive the injured party of liberty. The Court in *Paul* comprehensively surveyed its prior cases involving government actions that had stigmatizing effects, concluding that such effects were always secondary in the due process analysis to state infringement of independent property or liberty interests. *Id.* at 701-710. The Court therefore rejected "the proposition that reputation alone, apart from some more tangible interests such as employment, is either 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause." *Id.* at 701. Instead, the Court concluded that due process requirements are triggered only when, "as a result of the state action complained of, a right or status previously recognized by state law was distinctly altered or extinguished." *Id.* at 711. See *id.* at 708, 712.

The present case is squarely controlled by *Paul.* Respondent at worst suffered the sort of reputational injury at issue there—a public suggestion of criminal culpability. Indeed, on its face respondent's injury was considerably less severe than the one alleged in *Paul.* In that case, public officials identified the plaintiff as an "active shoplifter" to merchants throughout a large metropolitan area (see 424 U.S. at 695), an action that the Court recognized "seriously impair[ed] his future employment opportunities" (*id.* at 697; see *id.* at 720, 734 (Brennan, J., dissenting)). Here, in contrast, respondent was injured only to the extent that others in the community might have drawn negative inferences from the *pendency* of

charges against her, should they somehow have learned of the proceedings;[17] respondent failed even to allege that petitioners' actions affected her employment or other substantial interests. Similarly, the mental anguish inflicted upon the injured parties in the two cases was hardly dissimilar in kind.

In similar cases, the courts of appeals accordingly have held that malicious prosecution or the abuse of civil process by a state actor does not, standing alone, give rise to a liberty deprivation. These courts have recognized that the mechanism by which the injury is inflicted—whether through the lodging of a criminal or civil complaint, or, as in *Paul*, by means of a public allegation—is not relevant to the existence of a due process claim. Instead, realizing that it is the harm inflicted upon the plaintiff that gives rise to a deprivation, they have looked to the nature of the plaintiff's *injury*. And they have concluded that, at least where there is no arrest or imprisonment and the plaintiff is not compelled to become actively involved in legal proceedings, "to the extent that the complaint [of malicious prosecution] relies on injury to * * * reputation as a deprivation of liberty, it fails to state a claim" under *Paul. Terket* v. *Lund*, 623 F.2d 29, 31 n.1 (7th Cir. 1980). See *Mark* v. *Furay*, 769 F.2d 1266, 1271 (7th Cir. 1985); *Bretz* v. *Kelman*, 773 F.2d 1026, 1031 (9th Cir. 1985) (en banc); *Cook* v. *Houston Post*, 616 F.2d 791, 794 (5th Cir. 1980); *Cameo Convalescent Center, Inc.* v. *Senn*, 738 F.2d 836, 845 (7th Cir. 1984) (institution of civil proceedings by state officials), cert. denied, No. 84-505 (Jan. 7, 1985); *Cloutier* v. *Town of Epping*, 714 F.2d 1184, 1190 (1st Cir. 1983) (same); *Havas* v. *Thornton*, 609 F.2d 372, 373-375 (9th Cir. 1979) (same); *Green* v. *DeCamp*, 612

[17] In contrast to *Paul*, this obviously is not a case where "the police * * * have officially imposed on respondent the stigmatizing label 'criminal' without the salutary and constitutionally mandated safeguards of a criminal trial." *Paul*, 424 U.S. at 718 (Brennan, J., dissenting).

F.2d 368, 369-370 (8th Cir. 1980) (legislative investigation). Cf. *Dunn* v. *Tennessee*, 697 F.2d 121, 125-126 (6th Cir. 1982) (malicious prosecution gives rise to a constitutional claim when combined with allegation of false arrest); *Gumz* v. *Morrissette*, 772 F.2d 1395, 1408 (7th Cir. 1985) (Easterbrook, J., concurring) ("gratuitous fright or shock" associated with an arrest does not implicate a liberty interest).[18]

3. It should be added that this is not a case where application of the so-called "stigma-plus" doctrine would be appropriate. That label has been applied to this Court's suggestion that injury to reputation, when *combined* with loss of government employment or other grievous injury, may result in the deprivation of a protected interest. The Court has emphasized that this doctrine comes into play only when the defamatory material is circulated "in connection with [the plaintiff's] termination" (*Codd* v. *Velger*, 429 U.S. 624, 628 (1977)); it is the dismissal or other action changing the plaintiff's status that "trigger[s] the due process right to a

[18] While several courts have held that malicious prosecution may give rise to a due process claim, in doing so they have lost sight of this Court's repeated admonition that a deprivation of constitutional magnitude must be identified before the adequacy of the process is considered. These courts have reasoned that due process imposes a duty on the charging party to make a good faith finding of probable cause before a criminal complaint is issued, and that a complainant "can be liable for subverting the performance of that duty." *Wheeler* v. *Cosden Oil & Chemical Co.*, 734 F.2d 254, 260 (5th Cir. 1984). See *Jennings* v. *Shuman*, 567 F.2d 1213, 1220 (3d Cir. 1977) ("[a]n abuse of process is by definition a denial of due process"). Cf. *Morrison* v. *Jones*, 551 F.2d 939, 940-941 (4th Cir. 1977) (court held without analysis that a constitutional malicious prosecution claim could proceed to trial). But "[p]rocess is not an end in itself. Its constitutional purpose is to protect a substantive interest * * *." *Olim* v. *Wakinekona*, 461 U.S. 238, 250 (1983). Thus, even if the state's conduct otherwise would be constitutionally objectionable, the plaintiff still must identify a deprivation of liberty. See *ibid.* Cf. *Carey* v. *Piphus*, 435 U.S. 247, 259 (1978). Where the only injury is to reputation, no such deprivation has taken place.

hearing." *Owen* v. *City of Independence*, 445 U.S. 622, 633 n.13 (1980). See *id.* at 661 (Powell, J., dissenting); *Codd*, 429 U.S. at 629 (Brennan, J., dissenting); *id.* at 633 (Stevens, J., dissenting). Cf. *Bishop* v. *Wood*, 426 U.S. 341, 348 n.12 (1976). This doctrine is grounded on the rationale that a liberty interest is implicated when the government

> either ha[s] formally deprived one of a legal right, such as the right to purchase liquor or to drive, or ha[s] so severely impaired one's ability to take advantage of a legal right, such as a right to be considered for government contracts or employment or a right to seek non-government employment, that the government can be said to have 'foreclosed' one's ability to take advantage of it and thus extinguished the right.

Mosrie v. *Barry*, 718 F.2d 1151, 1161 (D.C. Cir. 1983) (footnote omitted). See, *e.g.*, *Lawson* v. *Sheriff of Tippecanoe County*, 725 F.2d 1136, 1138-1139 (7th Cir. 1984); *Havas*, 609 F.2d at 375.

Whatever the boundaries of this doctrine,[19] it plainly is not applicable here. Within the limitations period, petitioners did nothing to respondent in addition to the maintenance of the assertedly defamatory charge. They took no other action that might trigger the requirements of due process. And as is noted above, far from showing that her substantial rights had effectively been extinguished, respondent failed to allege *any* tangible consequences from petitioners' conduct; she alleged only humiliation.

This is not to deny, of course, that the conduct alleged by respondent was both wrongful and injurious. The

[19] It has been suggested that the stigma-plus doctrine is in tension with *Paul*, because the doctrine's premise is "that an unprotected interest in an untenured position plus an unprotected interest in reputation equals a protected interest. The logic of this analysis is not crystalline." *Mosrie*, 718 F.2d at 1163 n.8 (Ginsburg, J., concurring).

recognition of that reality has impelled both the states and the federal government (see, *e.g.*, 28 U.S.C. 2680(h)) to create causes of action to redress malicious prosecution and abuse of process on the part of state agents. Cf. *Daniels* v. *Williams*, No. 84-5872 (Jan. 21, 1986), slip op. 6. But "[i]t is no reflection on either the breadth of the United States Constitution or the importance of traditional tort law to say that they do not address the same concerns." *Ibid.* The Court has thus repeatedly held that wrongful state action—whether or not remediable under some other theory—does not give rise to a procedural due process claim unless it works a deprivation of a protected interest. See, *e.g.*, *Davidson* v. *Cannon*, No. 84-6470 (Jan. 21, 1986); *Daniels* v. *Williams*, *supra*; *Martinez* v. *California*, 444 U.S. 277 (1980); *Paul* v. *Davis*, *supra*. Cf. *Baker* v. *McCollan*, 443 U.S. 137 (1979). The actions challenged here by respondent failed to satisfy this requirement, for they simply did not have "consequences sufficiently grievous to constitute a deprivation of constitutionally protected liberty." *Codd*, 429 U.S. at 636 (Stevens, J., dissenting).

B. Even If Respondent Was Deprived Of Liberty, The Availability Of Post-Deprivation Remedies Provided All The Process Due

Because the harm inflicted upon respondent was not of constitutional magnitude, there is no need to consider the adequacy of the state's procedures for redressing her injury. But even if respondent was deprived of liberty, this Court's decisions in *Hudson* v. *Palmer*, No. 82-1630 (July 3, 1984), and *Parratt* v. *Taylor*, 451 U.S. 527 (1981), establish that the actions challenged here did not amount to a violation of the Fourteenth Amendment. Under the principle of those cases, the random and unauthorized nature of the challenged conduct, in combination with the complete adequacy of the state's available post-deprivation remedies, compels the conclusion that respondent was given all the process due.

1. a. This is not a case involving government actions that are unconstitutional "regardless of the fairness of the procedures used to implement them." *Daniels*, slip op. 5. See *id.* at 3 (Stevens, J., concurring in the judgment); *Parratt*, 451 U.S. at 545 (Blackmun, J., concurring). Even if the act of lodging a criminal complaint can be said to deprive the defendant of liberty, that is a deprivation of the sort that the state is entitled to effect, so long as it accompanies its action with adequate procedural protections. See generally *Carey* v. *Piphus*, 435 U.S. 247, 259 (1978); *Daniels*, slip op. 3-4 (Stevens, J., concurring in the judgment). Presumably, this requirement (if there is such a requirement) obligates the state to condition the filing of a complaint on a good faith finding by the charging party that a criminal action is justified.[20] And New York evidently does, as a general matter, provide procedural protections of that sort.[21] Indeed, re-

[20] The precise nature of the procedural safeguards that must accompany a state's charging (or criminal complaint) decision are unsettled. In the Fourth Amendment context, the Court has made it clear that an independent "probable cause determination is not a constitutional prerequisite to the charging decision" (*Gerstein* v. *Pugh*, 420 U.S. 103, 125 n.26 (1975)), although the Court did not directly address the question whether the prosecutor must find probable cause before bringing a charge. See *id.* at 118-119. See generally *Wheeler* v. *Cosden Oil & Chemical Co.*, 734 F.2d 254, 259-260 (5th Cir. 1984). The Court has elsewhere found the requisites of due process satisfied in cases involving liberty deprivations so long as the state's decision was supported by "some evidence in the record." *Superintendant* v. *Hill*, No. 84-438 (June 17, 1985), slip op. 8; see *id.* at 9 (citing cases). The common law standard for prosecutions is similar: it requires a malicious prosecution plaintiff to establish that the prosecution was unsupported by probable cause *and* that the charging party acted maliciously. See Pet. App. A26 (citing cases); W. Prosser & W. Keeton, *The Law of Torts* 871 (5th ed. 1984). There is no need to resolve this issue here, however, because respondent alleges that petitioners' actions were both malicious and unsupported by any evidence.

[21] Indeed, the existence of a state malicious prosecution remedy evidences the state's expectation that complaining parties will not act maliciously.

spondent makes no challenge to existing state procedures; to the contrary, her claim is grounded on an allegation that the petitioners willfully failed to comply with state law and intentionally misled a state judicial officer (Pet. App. A45 ¶ 12; *id.* at A14).

It was precisely that type of misconduct—"the unauthorized failure of agents of the State to follow established state procedures" (*Parratt*, 451 U.S. at 543)—that *Parratt* and *Hudson* held not to give rise to a procedural due process claim. In *Parratt*, the Court addressed the negligent actions of a state official that resulted in the loss of property. 451 U.S. at 530. After canvassing prior cases holding that post-deprivation process may be adequate when a predeprivation hearing is not feasible (*id.* at 538-541), the Court noted that an injury caused by negligence "is not a result of some established state procedure and the State cannot predict precisely when the loss will occur. • • • Indeed, in most cases it is not only impractical, but impossible, to provide a meaningful hearing before the deprivation." *Id.* at 541. The Court therefore held that a post-deprivation remedy in the form of a tort action for recovery of the lost property satisfied the central due process requirement of a hearing "'at a meaningful time and in a meaningful manner'" (*id.* at 540 (quoting *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965)); see *Parratt*, 451 U.S. at 543-544).[22]

In *Hudson*, the Court considered *Parratt*'s implications in a case, like this one, that involved unauthorized, malicious conduct by a state actor; there, a prison guard was alleged to have intentionally destroyed an inmate's noncontraband property (slip op. 2). The Court could find "no logical distinction" between the negligent conduct at issue in *Parratt* "and intentional deprivations of property insofar as the 'practicability' of affording predeprivation process is concerned," noting that "[t]he State can no more anticipate and control in advance the random and unauthorized intentional conduct of its employees than it can anticipate similar negligent conduct" (*id.* at 15). The Court therefore held—unanimously on this point (see *id.* at 2 n.4 (Stevens, J., concurring in part and dissenting in part))—that "'the impracticability of providing any meaningful predeprivation process, when coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking . . . satisf[ies] the requirements of procedural due process'" (*id.* at 14 (quoting *Parratt*, 451 U.S. at 539)).[23]

In reaching this conclusion, the Court recognized that it is the state's, rather than the individual state actor's, obligation to provide a system that makes adequate process available. Thus, when injury is caused by the misconduct of an individual state officer, "'even though there is action "under color of" state law sufficient to bring the [Fourteenth] amendment into play, the state action is not necessarily complete'" (*Parratt*, 451 U.S. at 542 (quoting *Bonner* v. *Coughlin*, 517 F.2d 1311, 1319 (1975), modified en banc, 545 F.2d 565 (7th Cir. 1976), cert. denied, 435 U.S. 932 (1978))); the adequacy of the state process cannot be determined "until and unless [the state] provides or refuses to provide a suitable post-deprivation remedy." *Hudson*, slip op. 15-16 (footnote omitted). In effect, the possibility that an individual state official will maliciously depart from established state procedures is an unavoidable defect in any state

[22] In *Daniels* v. *Williams*, *supra*, the Court overruled *Parratt*'s conclusion that a negligent act may "deprive" an individual of life, liberty, or property within the meaning of the Fourteenth Amendment. Slip op. 4. But *Daniels* did not disturb *Parratt*'s holding on the nature of the process due once a deprivation has been found.

[23] As Justice Stevens summarized the law earlier this year, under *Hudson* and *Parratt*, "when a predeprivation hearing is clearly not feasible, when the regime of state tort law provides a constitutionally unobjectionable system of recovery for the deprivation of property or liberty, and when there is no other challenge to the State's procedures, a valid § 1983 claim is not stated" (*Daniels*, slip op. 4-5 (Stevens, J., concurring in the judgment) (footnote omitted)).

process, and one that the state cannot be expected to eliminate altogether. The state therefore provides due process so long as it offers a mechanism, in the form of a state tort action, that can correct the mistakes caused by that defect.

b. This case is controlled by *Hudson*. Respondent's claim is grounded entirely on her allegation of malicious and unauthorized conduct on the part of state actors. As in *Hudson*, "[r]espondent does not even allege that the asserted destruction of [her] property occurred pursuant to a state procedure." *Hudson*, slip op. 16. And "[t]here is no contention that the procedures themselves are inadequate nor is there any contention that it was practicable for the State to provide a predeprivation hearing." *Parratt*, 451 U.S. at 543. See *Hudson*, slip op. 14; compare *Logan*, 455 U.S. at 436. In these circumstances, respondent can make out a denial of due process only if the state's post-deprivation remedies are inadequate.

Yet there is every indication that state tort law would provide respondent with a full recovery.[24] As the court of appeals acknowledged (Pet. App. A26-A27), New York recognizes a cause of action for malicious prosecution. Indeed, respondent's state tort suit against petitioners was pending when she initiated her federal action. And she has made no challenge to the adequacy of the state

[24] Even in the absence of a tort remedy, it would be arguable that the existence of further steps in the criminal justice process, which may cure the initial charging mistake and therefore correct the "defect" in the process that led to the prosecution, provided respondent all the process due. The initial detention of a criminal defendant is "only the *first* stage of an elaborate system, unique in jurisprudence, designed to safeguard the rights of those accused of criminal conduct." *Gerstein* v. *Pugh*, 420 U.S. 103, 125 n.27 (1975) (emphasis in original). A trial—or, as in this case, the independent judgment of a prosecutor—will be brought to bear on the validity of the charge before the process is complete. Those procedural safeguards should prevent an unforeseeable (and therefore unavoidable) malicious prosecution from leading to a serious impairment of liberty.

tort remedy.[25] See generally *Hudson*, slip op. 13 n.11, 17; *Parratt*, 451 U.S. at 544. This failure by respondent to raise "a challenge to the fundamental fairness of the State's procedures" is fatal to her constitutional claim. *Daniels*, slip op. 4 (Stevens, J., concurring in the judgment).[26]

2. The court of appeals nevertheless found the *Hudson-Parratt* analysis inapplicable in this case. It offered two reasons for this conclusion. The first was the court's belief that it would be inconsistent with *Monroe* v. *Pape*, 365 U.S. 167 (1961), to hold that respondent "is foreclosed from bringing her claims under § 1983 because the conduct of which she complains is tortious under state law" (Pet. App. A5). The second involved the court's determination that *Hudson* and *Parratt* are in any event applicable only to "special situations involving deprivations of property" (Pet. App. A5). The court of appeals' reasoning, however, fundamentally misapprehends the import of this Court's decisions.

a. *Monroe* v. *Pape*, *supra*, involved a claimed violation of the Fourth Amendment (see 365 U.S. at 170-171); the Court held that the availability of state remedies did not foreclose an action under Section 1983 to contest that violation (365 U.S. at 183). But *Parratt* and *Hudson* by their terms do not apply to cases, like *Monroe*, involving "conduct that violates a substantive constitutional right—actions government officials may not take no matter what

[25] While the New York statute of limitations is specifically applicable to state malicious prosecution claims (N.Y. Civ. Prac. Law § 215(3) (McKinney 1972)) (although not to Section 1983 claims such as the one at issue here, see Pet. App. A22; cf. *Wilson* v. *Garcia*, No. 83-2146 (Apr. 17, 1985)) sets a one-year limit, respondent brought her state tort suit within that limitations period.

[26] The essentially duplicative nature of the Section 1983 claim in these circumstances is emphasized here by the court of appeals' simple adoption of the elements of the state tort of malicious prosecution as defining a Section 1983 violation (see page 5, *supra*).

procedural protections accompany them." *Hudson*, slip op. 2 n.4 (Stevens, J., concurring in part and dissenting in part). Indeed, the Court in *Parratt* explicitly distinguished *Monroe* on that ground (451 U.S. at 536). This distinction follows necessarily from the rationale of *Hudson* and *Parratt*: "[I]f the Federal Constitution prohibits a State from taking certain action 'regardless of the fairness of the procedures used to implement them,' the constitutional violation is complete as soon as the prohibited action is taken." *Daniels*, slip op. 3 (Stevens, J., concurring in the judgment).

Hudson and *Parratt* apply, instead, to the claimed denial of *procedural* due process guarantees. In such cases, state remedies obviously are relevant—not for exhaustion purposes, but because those remedies, as part of the state's "process," must be considered when determining as an initial matter whether the state has committed a constitutional violation. "If a state offers its residents effective remedies for random and unauthorized wrongs done them, those remedies are the due process of which the Constitution speaks." *Gumz* v. *Morrissette*, 772 F.2d at 1409 (Easterbrook, J., concurring). See *Daniels*, slip op. 5 (Stevens, J., concurring in the judgment). Accordingly, despite some initial confusion [27] and occasional lingering doubts,[28] the courts of appeals—with the exception of the court below—have now uniformly held that the *Hudson-Parratt* analysis is controlling in all cases of unauthorized state misconduct presenting procedural due process claims, and is inapplicable in cases involving substantive constitutional violations (that is, cases involving the denial of specifically enumerated federal rights [29] or of substantive due process).[30]

Here, as in *Hudson* and *Parratt*, respondent's claim involves an asserted denial of her rights under "the Due Process Clause of the Fourteenth Amendment *simpliciter*" (*Parratt*, 451 U.S. at 536). Respondent has not alleged the deprivation of any specific, substantive federal rights within the limitations period. Nor, as the court of appeals evidently recognized, do any of her claims state a denial of substantive due process.[31] By failing to apply *Hudson* and *Parratt* in these circumstances, the court of appeals—

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[27] See generally *Hudson*, slip op. 13 n.10; *Gilmere* v. *City of Atlanta*, 774 F.2d 1495, 1498 (11th Cir. 1985) (en banc), petition for cert. pending, No. 85-1186.

[28] See *Mann* v. *City of Tucson*, 782 F.2d 790, 796-800 (1986) (Sneed, J., concurring in the result), amended, No. 85-1847 (9th Cir. Mar. 24, 1986); *Gumz* v. *Morrissette*, 772 F.2d at 1409 (Easterbrook, J., concurring); *Gilmere* v. *City of Atlanta*, 774 F.2d 1495, 1513-1514 (11th Cir. 1985) (Hill, J., dissenting) (en banc), petition for cert. pending, No. 85-1186. Cf. *Bretz*, 773 F.2d at 1030-1031 (*Parratt* analysis applies to all actions that are "random and unauthorized" but not to "abuse of the state process itself").

[29] See, *e.g.*, *Gumz* v. *Morrissette*, 772 F.2d at 1400 n.3; *Gilmere* v. *City of Atlanta*, 774 F.2d 1495, 1502 (11th Cir. 1985) (en banc), petition for cert. pending, No. 85-1186; *Wilson* v. *Beebe*, 770 F.2d 578, 581-583, 586 (6th Cir. 1985) (en banc); *Augustine* v. *Doe*, 740 F.2d 322, 325-327, 329 (5th Cir. 1984); *Wolf-Lillie* v. *Sonquist*, 699 F.2d 864, 871-874 (7th Cir. 1983).

[30] See, *e.g.*, *Kidd* v. *O'Neill*, 774 F.2d 1252, 1260-1261 n.14 (4th Cir. 1985); *Wilson* v. *Beebe*, 770 F.2d 578, 581-583, 586 (6th Cir. 1985) (en banc); *Williams* v. *City of St. Louis*, 783 F.2d 114, 118 (8th Cir. 1986); *Littlefield* v. *City of Afton*, No. 85-5005 (8th Cir. Jan. 3, 1986), slip op. 22-23, amended (8th Cir. Feb. 11, 1986); *Mann* v. *City of Tucson*, 782 F.2d 790, 793 (1986), amended, No. 85-1847 (9th Cir. Mar. 24, 1986); *Rutherford* v. *City of Berkeley*, 780 F.2d 1444, 1447-1448 (9th Cir. 1986); *Gilmere* v. *City of Atlanta*, 774 F.2d 1495, 1499 (11th Cir. 1985) (en banc), petition for cert. pending, No. 85-1186.

[31] The courts generally have understood substantive due process rights to be implicated only when the state deliberately inflicts serious injury by the application of "excessive force or brutality" (*Fernandez* v. *Leonard*, No. 85-1403 (1st Cir. Mar. 6, 1986), slip op. 11; see *id.* at 11-14 (citing cases)), or otherwise engages in conduct "offensive to 'the concept of ordered liberty'" (*Baker* v. *McCollan*, 443 U.S. 137, 147 (1979) (Blackmun, J., concurring) (quoting *Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937)). See generally *Rochin* v. *California*, 342 U.S. 165, 175 (1952).

far from preserving any of this Court's decisions—would read those two cases out of the law altogether.

b. The court of appeals' alternative conclusion that the *Hudson-Parratt* analysis does not apply to cases involving deprivations of liberty also rests on a misunderstanding of the logic of those decisions. It is certainly true that both *Hudson* and *Parratt* involved only deprivations of property, and the Court duly noted that fact in each case. *Hudson*, slip op. 12-13; *Parratt*, 451 U.S. at 541-542. But the Court made it plain that, in determining whether a post-deprivation tort remedy is adequate, "[t]he controlling inquiry is solely whether the State is in a position to provide for predeprivation process." *Hudson*, slip op. 16. And where the deprivation is inflicted through the unauthorized act of an individual state employee, that inquiry will lead to the same conclusion whether the deprivation is of property or of liberty: in either case, it " 'is difficult to conceive of how the State could provide a meaningful hearing before the deprivation takes place.' " *Id.* at 14, quoting *Parratt*, 451 U.S. at 541.

Thus, as Justice Stevens explained earlier this year:

> In both cases [that is, deprivations of property and liberty], the plaintiff claim[s] nothing more than a 'procedural due process' violation. In both cases, a predeprivation hearing [is] definitionally impossible. And, in both cases, the plaintiff ha[s] state remedies that permit[] recovery if state negligence can be established.

Daniels, slip op. 7 (Stevens, J., concurring in the judgment) (footnote omitted). Finding *Hudson* and *Parratt* controlling in cases involving liberty interests therefore involves nothing more than a "straightforward application" of those decisions. *Ibid.* This conclusion was presaged by *Ingraham* v. *Wright*, 430 U.S. 651, 682 (1977), which—as *Parratt* noted (451 U.S. at 542)—declined to find a procedural due process violation in a case involv-

ing an intentional deprivation of liberty, relying in part on the availability of common law remedies.[32]

Again, after an initial period of confusion,[33] a clear majority of the courts of appeals that have addressed the issue have firmly endorsed the conclusion that the *Hudson-Parratt* approach should be applied in cases involving liberty deprivations. See *Wadhams* v. *Procunier*, 772 F.2d 75, 77-78 (4th Cir. 1985); *Thibodeaux* v. *Bordelon*, 740 F.2d 329, 334-338 (5th Cir. 1984);[34] *Wilson* v. *Beebe*, 770 F.2d 578, 584 (6th Cir. 1985) (en banc); *Ellis* v. *Hamilton*, 669 F.2d 510, 514-515 (7th Cir.), cert. denied, 459 U.S. 1069 (1982); *Economic Development Corp. of Dade County* v. *Stierheim*, 782 F.2d 952, 954-955 (11th Cir. 1986).[35] These courts have recognized, in

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[32] The argument that money damages cannot fully compensate the injured party for a deprivation of liberty is no answer to this reasoning, for "this is as much so under § 1983 as it would be under any other remedy." *Hudson*, slip op. 17. See *Thibodeaux* v. *Bordelon*, 740 F.2d 329, 338 (5th Cir. 1984). See generally *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Similarly, courts that have been troubled by the application of the *Hudson-Parratt* analysis to deprivations of liberty may have believed that such cases tend to involve especially overbearing government conduct. If the actions at issue in those cases are particularly egregious, however, they may rise to the level of substantive due process violations (see note 31, *supra*), and therefore would not fall under *Hudson* or *Parratt* in any event.

[33] See generally *Thibodeaux* v. *Bordelon*, 740 F.2d 329, 335 (5th Cir. 1984).

[34] In so holding, the Fifth Circuit evidently overruled its prior decision in *Brewer* v. *Blackwell*, 692 F.2d 387 (1982), apparently on the basis of this Court's intervening decision in *Hudson*.

[35] With the exception of the court below, no court of appeals has unequivocally held that the *Hudson-Parratt* analysis should not be applied to deprivations of liberty. The Third Circuit has indicated that it reads *Parratt* as applicable only to deprivations of property, but it did not rest its holding on that ground. *Davidson* v. *O'Lone*, 752 F.2d 817, 828-829 (1984) (en banc), aff'd, No. 84-6470 (Jan. 21, 1986). The Ninth Circuit has expressed conflicting views

Judge Wisdom's words, that *Parratt* is "part of a consistent body of procedural due process doctrine." *Thibodeaux*, 740 F.2d at 336. And looking to *Hudson*, Judge Wisdom concluded that "[t]he central question in determining the applicability of *Parratt* * * * is whether it is practicable for the state to provide a predeprivation hearing * * *. Just as there is no reason to distinguish intentional from negligent deprivations, there is no reason to differentiate between liberty interests and property interests." *Id.* at 336-337. Because the state could not have provided respondent a predeprivation hearing, but did offer her a fully adequate post-deprivation remedy, that reasoning is dispositive here.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APRIL 1986

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on the issue. Compare *Rutledge* v. *Arizona Board of Regents*, 660 F.2d 1345, 1352 (1981), aff'd on other grounds, 460 U.S. 719 (1983), with *Wakinekona* v. *Olim*, 664 F.2d 708, 715 (1981), rev'd on other grounds, 461 U.S. 238 (1983).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1986 481507 20192

AMICUS CURIAE

BRIEF

(8)

Supreme Court, U.S.
FILED
JUN 13 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1947

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

VINCENT T. CERBONE, Justice of the Village Court, Village of Mt. Kisco, New York, *et al.*,

Petitioners,

—v.—

LYNN H. CONWAY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE NEW YORK CIVIL LIBERTIES UNION AS *AMICI CURIAE*

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43 pp

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INTEREST OF AMICI[1]

The American Civil Liberties Union is a nationwide, non-partisan, membership organization dedicated to the principles of individual liberty embodied in the United States Constitution. The New York Civil Liberties Union is a statewide affiliate of the ACLU. Both organizations have participated in numerous cases before this Court.

The present case arises from a seemingly mundane commercial transaction. It nonetheless raises several significant constitutional issues. First, does the Constitution place <u>any</u> limit on individuals acting under color of law who intentionally and maliciously abuse the state's judicial machinery in order to pursue their own

1. Letters of consent to the filing of this brief have been separately lodged with the Clerk of the Court pursuant to Rule 36.2.

personal vendetta? Second, what are the proper criteria for disinguishing between a substantive and procedural claim under the due process clause of the Fourteenth Amendment? Third, does the availability of a post-deprivation remedy provided by the state cure what would otherwise be an unconstitutional denial of substantive rights?

The answer to these questions will inevitably affect the ongoing work of the ACLU and its local affiliates throughout the country.

PRELIMINARY STATEMENT

The United States has submitted a brief as amicus curiae in this case urging reversal of the decision below. That goal is obviously shared by petitioners as well. It is worth noting at the outset, however, that the United States does not endorse the legal arguments advanced by petitioners nor do petitioners endorse the legal arguments advanced by the United States. Indeed, on every key point but one, these two ostensible allies take conflicting and irreconcilable positions.

Neither believes that respondent has alleged the denial of any constitutional right. But the common ground ends with this joint assertion. The United States strenuously argues that any claim respondent might have is procedural in nature. Petitioners' brief is ambiguous on this point

but suggests at least a tacit acknowledgement that respondent's claim has substantive elements. Similarly, the government concedes that the holding in Parratt v. Taylor, 451 U.S. 527 (1981), is properly limited to procedural due process claims. Petitioners, by contrast, apparently contend that Parratt applies to all due process claims, regardless of whether they are procedural or substantive.

In our view, the correct solution to the problems posed by this case lies midway between these two approaches. Thus, we agree with petitioners that the liberty claim presented by respondent is more substantive than procedural. And we agree with the government that Parratt does not extend to substantive claims.

As this Court has frequently observed, 42 U.S.C. §1983 was adopted to provide a federal forum for the vindication of

constitutional rights. Petitioners' proposal to eliminate that federal forum whenever the state provides its own supplemental remedy would stand history on its head and, as the Second Circuit correctly observed, overrule a critical element of this Court's landmark decision in Monroe v. Pape, 365 U.S. 167 (1961). The government's effort to avoid this result by mislabeling respondent's claim as a procedural one is simply another means to the same discredited end.

The fate of Lynn Conway's automobile is no longer the issue. The issue is whether the federal courts will remain what they have been for more than a century -- a place where individuals aggrieved by the unconstitutional action of government officials can seek legal redress for the violation of their constitutional rights.

THE DECISION BELOW[2]

The decision below has been challenged in this Court upon the erroneous assertion that the only constitutional injury identified by the Second Circuit was the "humiliation, ridicule, and mental anguish" allegedly suffered by respondent as a result of the events described in her complaint.

That mischaracterization is essential to the argument, pressed both by petitioners and the United States, that this case is controlled by Paul v. Davis, 424 U.S. 693 (1976), which forecloses a constitutional claim based solely upon reputational injury.

The effort to describe the Second Circuit decision as based solely upon "reputational injury," however, is both incomplete and misleading. It confuses, as the Second Circuit did not, the difference between a constitutional cause of action and the injury created by unconstitutional conduct.[3]

This Court held in Paul v. Davis that an action for common law defamation cannot be converted into a §1983 lawsuit merely because the alleged tortfeasor is a state official. Paul does not hold that "reputational injury" may never be considered as part of a constitutional claim.

To the contrary, Paul approvingly cites a series of decisions in which "reputational injury" formed a significant element of plaintiff's constitutional claim. See e.g. Goss v. Lopez, 419 U.S. 565, 574-75 (1975);

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2. Amici accept the statement of facts set forth in the Second Circuit's initial opinion. 750 F.2d 205, 207-11 (1984).

3. The government properly acknowledges that under the so-called "stigma-plus" doctrine, stigma may combine with a denial of substantive rights to support a constitutional cause of action. Brief at 14-15.

Board of Regents v. Roth, 408 U.S. 564, 573 (1972); Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971); Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123 (1951).

What distinguishes Paul from this line of cases is that, in Paul, the plaintiff alleged only reputational injury. His complaint, as this Court noted, failed to "assert [the] denial of any right vouchsafed to him by the State and thereby protected under the Fourteenth Amendment." 424 U.S. at 712.

Here, respondent asserts that her injuries flow from the alleged deprivation of a substantive right protected by the Fourteenth Amendment. Thus, unlike Paul, respondent's claim is not based on "reputational injury." Nor does the decision below equate respondent's constitutional

claim with her "reputational injury."[4]

Rather, the Second Circuit began its discussion of respondent's claim by noting its earlier decisions had already concluded that an allegation of malicious prosecution could, under appropriate circumstances, state a cause of action under §1983. The court, therefore, felt no need to rehash old ground. Instead, it rested with a citation to Singleton v. New York, 632 F.2d 185 (2d Cir. 1980), cert. denied, 450 U.S. 920 (1981), which had previously established that the "essence of the §1983 claim is the alleged

4. Respondent was arrested, detained for seven hours, and faced with criminal charges for more than two years. 750 F.2d at 209. Each of these injuries flowed from the allegedly malicious prosecution and is compensable as part of the malicious prosecution claim. See n.9, supra.

groundless prosecution . . ." Id. at 195.[5]

Until this Court, petitioner Cerbone apparently never disputed that a claim "in the nature of malicious prosecution" could be brought under §1983 in appropriate circumstances. 758 F.2d at 48. His objection was limited to the contention that respondent's allegations lacked "constitutional magnitude." Id. It was in response to this objection that the Second Circuit found that respondent had indeed alleged substantial injuries in the form of "humiliation, ridicule, and mental anguish."

Unavoidably, therefore, the threshhold issue before this Court is whether a claim that the state's judicial machinery was maliciously abused by persons acting under color of law is cognizable under §1983. For reasons described more fully below, the answer to that question must surely be yes.[6]

5. The jurisdictional prerequisites of §1983 are satisfied by respondent's allegation that the conspiracy to deprive her of her constitutional rights included the active participation of a local magistrate and policeman. See Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970). The fact that Justice Cerbone was dismissed from the suit in his official capacity because of judicial immunity does not alter the nature of the alleged conspiracy.

6. To the extent that there is ambiguity about the precise holding of the Second Circuit, it may be appropriate to consider dismissing the writ of certiorari as improvidently granted. See New York v. Uplinger, ___ U.S. ___, 81 L.Ed.2d 201 (1984).

SUMMARY OF ARGUMENT

This is not a case about "reputational injury," it is a case about impartial justice. The complaint alleges that persons acting under color of law deliberately and maliciously abused the state's criminal process. The complaint further alleges that respondent suffered clear and forseeable consequences as a result, including arrest, detention and "humiliation." These allegations state a cause of action under 42 U.S.C. §1983, which was adopted by a Congress specifically concerned about judicial breakdowns on the local level.

Moreover, respondent's due process claim is plainly substantive rather than procedural. Indeed, respondent's grievance is that she received too much procedure, not too little. A post-deprivation hearing simply does not address respondent's contention that

she should never have suffered any hearing at all.

Finally, the holding of Parratt v. Taylor is inapplicable to the facts of this case. At least six Justices of this Court have already indicated that Parratt does not extend to substantive claims. Nor should it. Unlike the procedural violation considered in Parratt, a substantive violation is still unconstitutional even if accomplished with procedural regularity.

ARGUMENT

I. AN ALLEGATION THAT PERSONS ACTING UNDER COLOR OF LAW MALICIOUSLY ABUSED THE CRIMINAL PROCESS STATES A CAUSE OF ACTION UNDER §1983

The history and purpose of §1983 have been examined by this Court in minute detail. See e.g., Wilson v. Garcia, ___ U.S. ___, 85 L.Ed.2d 254 (1985); Monell v. Department of Social Services, 436 U.S. 658 (1978); Monroe, supra.

Based upon that review of the legislative history, it is now commonly agreed that §1983 was adopted in response to what Congress perceived as a generalized breakdown in the administration of justice in the Southern states following the Civil War. In particular, Congress was deeply concerned by evidence showing that Southern officials had been "unable or unwilling" to stem the tide of Klan violence through vigorous enforcement

of state criminal laws.

This case presents the reverse situation. Respondent's claim is that petitioners have misused the criminal process rather than ignored it. In this context, however, there is no reason to distinguish between sins of commission and sins of omission.

To accept the argument that §1983 does not reach the conduct described in respondent's complaint, it is necessary to believe that the 42nd Congress would have been undisturbed by evidence that Southern officials were falsely prosecuting innocent victims of Klan violence, as well as failing to bring legitimate prosecutions against Klan members. Merely to state the proposition is sufficient to refute it.

Both the legislative debate that preceded passage of §1983, and this Court's decisions interpreting the statutory

language, repeatedly refer to the right of each citizen to demand that the government execute the laws in a faithful and impartial manner. E.g. Monell v. Department of Social Services, 436 U.S. at 670.

Undoubtedly, government officials who tolerate vigilantism have failed in that obligation. But it is equally clear that government officials who convert the power to prosecute into a power to persecute have also violated their constitutional duty. In either event, there has been what one supporter of §1983 aptly described as a "defect in the administration of the laws..." Cong. Globe, 42d Cong., 1st Sess. 505 (remarks of Sen. Pratt), quoted in Monroe, 365 U.S. at 178.

Maladministration of the laws can have many consequences. A failure to prosecute can lead to injury or death, as it frequently did during the Klan rampages that led to

enactment of §1983. A malicious prosecution can lead, as it allegedly did in this case, to false arrest, false imprisonment and emotional distress. Whatever the consequences, however, the core of the constitutional complaint is the "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law..." United States v. Classic, 313 U.S. 299, 326 (1941).[7]

Amici do not suggest that every abuse of state power violates the Constitution and automatically gives rise to a §1983 action.

7. The government takes precisely the opposite position, contending that a constitutional violation is determined by the nature of the injury rather than the "mechanism" of the deprivation. Brief at 13. This contention is difficult to fathom. Whether an individual's property is deprived through the lawful mechanism of due process or by arbitrary seizure is obviously crucial in evaluating a §1983 claim.

Some abuses may not trample on any constitutional right. See Baker v. McCollan, 443 U.S. 137 (1979); Paul v. Davis, supra.[8] Other abuses may be insulated from judicial review by various immunities. See Pierson v. Ray, 386 U.S. 547 (1967); Tenney v. Brandhove, 341 U.S. 367 (1979).

At this stage of the litigation, however, petitioners are not relying on an immunity defense. And the professed inability to find any constitutional anchor for respondent's complaint simply overlooks petitioners' Fourteenth Amendment duty to enforce the laws fairly. Cf. Aetna Life Insurance Co. v. Lavoie, 54 U.S.L.W. 4381 (April 22, 1986)(judge may not participate in

8. Citing Paul, the government contends that respondent never suffered any "alteration" in her legal status. Brief at 11. That is plainly incorrect. As a matter of law, a person under arrest is considered "in custody" for habeas corpus purposes. Cf. Jones v. Cunningham, 371 U.S. 236 (1963).

any case in which he has substantial personal interest).

Admittedly, this duty is not delineated in the Constitution in so many words. It is nonetheless implicit in the relationship between individuals and the government that lies at the core of the Fourteenth Amendment. The contours of that relationship were spelled out by this Court in Monell.

Quoting again from the legislative history of §1983, this Court noted that the drafters of the Fourteenth Amendment clearly believed that it imposed an obligation on government to protect its citizens. 436 U.S. at 658. That obligation is often enforced through the criminal justice system.

A criminal justice system that persecutes the innocent through baseless prosecutions is not fundamentally different than a criminal justice system that permits persecution of the innocent by private

vigilantes, like the Ku Klux Klan. What the government may not do indirectly, it surely may not do directly.[9]

Although not precisely on point, Briscoe v. LaHue, 460 U.S. 325 (1983), also undermines the contention that §1983 does not reach abuses of the criminal process. The plaintiff in Briscoe was a felon who sought damages under §1983 against a police officer for allegedly perjurious testimony at plaintiff's criminal trial. In dismissing the complaint, this Court relied entirely on the common law immunity for trial witnesses.

9. The United States apparently agrees that a complaint of malicious prosecution can state a claim under §1983 if accompanied by an assertion of false arrest and/or imprisonment. Brief at 13. The government argues, however, that those claims are time-barred in this case and thus may not be considered. The government ignores the fact that evidence of respondent's arrest and imprisonment may still be admissible as part of her malicious prosecution claim. Thus, even under the government's theory, respondent's complaint was improperly dismissed.

Had this Court agreed with petitioners' view that misuse of the state's judicial machinery is not remediable under §1983, it presumably would have said so rather than rely on the existence of an affirmative defense.

II. RESPONDENT'S DUE PROCESS CLAIM IS SUBSTANTIVE, NOT PROCEDURAL

Respondent's co laint in this case essentially states that she was unfairly subjected to the state's criminal processes through the malicious conspiracy of a group of individuals acting under color of law. The government contends that this complaint is procedural and therefore subject to the strictures of Parratt v. Taylor, 451 U.S. 527 (1981). That notion is an odd one, at best. Procedure is the problem in this case, not the solution.

As Justice Stevens noted earlier this Term, the due process clause of the Fourteenth Amendment embodies three separate and distinct categories of rights. Daniels v. Williams, 54 U.S.L.W. 4090, 4093 (Jan. 21, 1986)(Stevens, J., concurring). First, it incorporates specific guarantees contained in

the Bill of Rights. Id. Second, under the rubric of "substantive due process," it bars certain arbitrary government action. Id. Third, it assures that no person will be deprived of life, liberty or property without fair procedures. Id.

The simplest way to distinguish a substantive claim from a procedural claim is by asking whether the government could achieve the end that it seeks by providing a constitutionally adequate hearing. If so, the claim is a procedural one. On the other hand, if the government's desired end is invalid "regardless of the fairness of the procedures used to [reach it]," Daniels, 54 U.S.L.W. at 4091, then the claim is substantive in nature.

For example, in a classic procedural case like Goldberg v. Kelly, 397 U.S. 254 (1970), there was no dispute that the state was legitimately entitled to terminate the

welfare benefits of a recipient who no longer satisfied the eligibility criteria; the issue was whether or not the recipient was entitled to a pre-termination hearing to contest that determination. By contrast, in Moore v. East Cleveland, 431 U.S. 494 (1977), a classic substantive due process case, a hearing would have been pointless since the state was affirmatively barred under the Fourteenth Amendment from discriminating against certain family units.

Parratt v. Taylor, supra, and Hudson v. Palmer, ___ U.S. ___, 82 L.Ed.2d 393 (1984), are entirely consistent with this mode of analysis. Both cases involved the alleged deprivation of a prisoner's property. In both cases, the prisoners alleged a denial of procedural due process. And in both cases, this Court concluded that the state qua state had not acted contrary to due process since it provided a post-deprivation remedy in the

state courts.

What the government overlooks in relying on these cases is that the deprivation of property is not always wrongful. It is wrongful only if accomplished without due process. Accordingly, by providing due process, even after the fact, the state has fully satisfied its constitutional obligation.[10]

Respondent's claim of malicious prosecution fits into an entirely different category. By definition, a malicious prosecution is already accompanied by all of the trappings of due process. In this case, for example, respondent was arrested, charged and brought before a court. The complaint is

10. "In a procedural due process claim, it is not the deprivation of property or liberty that is unconstitutional; it is the deprivation of property or liberty without due process -- without adequate procedures." Daniels, 54 U.S.L.W. at 4093 (Stevens, J., concurring)(emphasis in original).

not too little process but too much; more specifically, too much process without even a good faith belief that any process at all was either necessary or justified.

The Second Circuit's analogy to Monroe v. Pape is an appropriate one. The search of a home without probable cause is a constitutional violation regardless of whether or not it is surrounded by procedure. Indeed, in Malley v. Briggs, 54 U.S.L.W. 4243 (Mar. 4, 1986), this Court recently held that the issuance of an arrest warrant does not immunize the arresting officer from a suit for damages under §1983 if the warrant was procured in bad faith.

This Court's Eighth Amendment cases also illustrate the difference between substantive and procedural claims. Deliberate indifference to a prisoner's medical needs is cruel and unusual treatment, and therefore actionable under §1983, even if the state

provides an independent remedy for medical malpractice. See Estelle v. Gamble, 429 U.S. 97 (1976). Similarly, the malicious use of force in a prison setting violates the Eighth Amendment even though state tort remedies might be available. See Whitley v. Albers, 54 U.S.L.W. 4236, 4238-9 (Mar. 4, 1986).

The claim of malicious prosecution in this case is just as substantive as a claim of malicious force by prison guards. In each instance, the constitutional violation occurs when the act is completed. It does not depend on, and cannot be cured by, the availability of a future hearing. In Parratt, the availability of a hearing effectively nullified the claim that property was seized without due process of law. The availability of a state hearing in this case will not nullify the theoretical foundation of respondent's malicious prosecution claim.

It is possible, of course, that

respondent could obtain full compensation for her loss in state court. However, when substantive constitutional rights are involved, the choice to seek compensation in state or federal court belongs to respondent, as this Court has consistently recognized since Monroe v. Pape.

III. THE HOLDING OF PARRATT DOES NOT EXTEND TO SUBSTANTIVE CLAIMS

Assuming that respondent's claim can properly be characterized as substantive in nature, Parratt and its progeny plainly do not apply. The argument that a violation of substantive constitutional rights is not complete unless the state has been given a first opportunity to rectify the mistake of its misbehaving agent contradicts nearly 75 years of constitutional jurisprudence.[11] It also contradicts the recently expressed views of at least six members of this Court.

This Court's decision in Home Tel. & Tel. Co. v. Los Angeles, 227 U.S. 278 (1913), considered and rejected a similar claim. In

11. Petitioners' argument comes very close to pressing for an exhaustion requirement in §1983 cases. This Court has clearly rejected that approach. Patsy v. Board of Regents, 457 U.S. 496 (1982).

that case, the city defended a constitutional challenge to its proposed ratemaking scheme on the ground that only the state could violate the Constitution and the state had not acted until the challenged regulation had been upheld by the state's highest court. This Court took a different view:

> [T]he theory of the [Fourteenth] Amendment is that where an officer or other representative of a state, in the exercise of the authority with which he is clothed, misuses the power possessed to do a wrong forbidden by the Amendment, inquiry concerning whether the state has authorized the wrong is irrelevant, and the Federal judicial power is competent to afford redress for the wrong by dealing with the officer and the result of his exertion of power.

227 U.S. at 287.

Parratt v. Taylor is consistent with this rule. It does not hold that state judicial remedies must be exhausted before a constitutional claim can be brought in

federal court. It merely holds that a constitutional violation has not occurred when the grievance is procedural and procedural remedies are still available. In this procedural context, this Court has in fact recognized a distinction between authorized and unauthorized acts. See Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982).[12] That distinction, however, has never been extended to substantive claims.

Petitioners' brief effectively obscures the consequence of their argument. Every Fourth Amendment case can be described as a common law trespass. Every police brutality case can be described as a common law battery. Were the Parratt doctrine extended to substantive claims, none of these cases

12. As Logan holds, a procedural claim that the state's authorized procedures are constitutionally inadequate obviously cannot be resolved by further resort to those procedures.

could be brought in federal court. And once brought in state court, a judgment on the merits would bar relitigation in a federal forum. See Migra v. Warren City School District, 465 U.S. 75 (1984). Nothing in Parratt even remotely supports that result.

To the contrary, the limits of Parratt have clearly been noted by a majority of this Court. In Parratt itself, Justice Blackmun wrote: "I continue to believe that there are certain governmental actions that, even if undertaken with a full panoply of procedural protections are, in and of themselves, antithetical to fundamental notions of due process." 451 U.S. at 545 (concurring opinion). Justice White expressly agreed with this "reservation." Id. (concurring opinion). Justice Powell also wrote separately to emphasize the difference between substantive and procedural claims under the Fourteenth Amendment. Id. at

552-53 (concurring opinion).

Justice Stevens expressed similar sentiments in Hudson v. Palmer, supra. Writing on behalf of Justices Brennan, Marshall and Blackmun, he joined in a portion of the Court's holding,

> on the understanding that it simply applies the holding of Parratt v. Taylor to the facts of this case[.] I do not understand the Court's holding to apply to conduct that violates a substantive constitutional right -- actions government officials may not take no matter what procedural protections accompany them . . .

82 L.Ed.2d at 412 n.4.[13]

This case presents precisely the situation described in Justice Stevens' footnote. Respondent alleges a violation of

13. The lower courts have generally agreed that Parratt does not apply to substantive constitutional claims. E.g., Pruitt v. City of Montgomery, 771 F.2d 1475, 1484 n.19 (11th Cir. 1985), and cases cited therein.

her substantive due process rights under the Fourteenth Amendment. Under these circumstances, Parratt v. Taylor simply does not apply.

CONCLUSION

For the reasons stated herein, the decision below should be affirmed.

Respectfully submitted,

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Dated: New York, NY
June 13, 1986